*Together with:

Trans World Airlines v. Brady — No. 713

Brady v. Trans World Airlines — No. 735

SUPREME COURT, U.S.
NOV 5 1968
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 712

INTERNATIONAL ASSOCIATION OF MACHINISTS, *Petitioner*,

v.

VINCENT P. BRADY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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November, 1968

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT	5
REASONS FOR GRANTING WRIT	
I. The Decision of the Court of Appeals Conflicts With Decisions of Other Courts of Appeals on the Same Matter	13
A. The decision of the Court of Appeals conflicts with decisions of other Courts of Appeals on the jurisdiction of the Railway Labor Act Adjustment Boards to interpret and apply union security provisions of a collective bargaining agreement	13
B. The holding of the Court of Appeals that the claim of discrimination in the amended complaint raises a Federal question conflicts with decisions of other Court of Appeals on this point	18
C. The Court of Appeals' decision conflicts with decisions of other Courts of Appeals holding that a union mmeber must exhaust internal remedies before he can sue his union for alleged discrimination	19
II. The Court of Appeals' Decision Conflicts With Applicable Decisions of this Court	21

Page

III. The Court of Appeals' Decision Raises Substantial and Important Questions of Federal Law Which Should Be Settled by This Court 22

A. The decision raises substantial and important questions of Federal law with respect to the jurisdiction of Railway Labor Act adjustment boards 22

B. The decision raises substantial and important questions of Federal jurisdiction 23

IV. The Court of Appeals' Decision Errs in Substantial and Important Respects 25

CONCLUSION 28

INDEX TO CITATIONS

CASES:

Alabaugh v. Baltimore & Ohio R. Co., 222 F.2d 861, 867 (4th Cir., 1955), *cert. den.* 350 U.S. 839 ....15, 16, 17, 18

Battle v. Brotherhood of Railway and Steamship Clerks, 320 F.2d 742 (D.C. Cir., 1963) 15

Bower v. Eastern Air Lines, Inc., 214 F.2d 623, 3rd Cir., 1954) 15

Brady v. Trans World Airlines, Inc., 156 F. Supp. 82.. 2

Brady v. Trans World Airlines, Inc., 167 F. Supp. 469 2

Brady v. Trans World Airlines, Inc., 174 F. Supp. 360 2

Brady v. Trans World Airlines, Inc., 196 F. Supp. 504 2

Brady v. Trans World Airlines, Inc., 223 F. Supp. 361 2

Brady v. Trans World Airlines, Inc., 244 F. Supp. 820 2

Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U.S. 30 .....14, 22

Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad, 370 F.2d 833 (10th Cir., 1966), *cert. den.* 386 U.S. 1018 14

Fingar v. Seaboard Airline Railroad Company, et al., 277 F.2d 698 (5th Cir., 1960) 19

Gainey v. Brotherhood of Railway and Steamship Clerks, et al., 275 F.2d 342, 345 (1960) 20, 21

Huffman v. Ford Motor Co., 345 U.S. 320 23

Humphrey v. Moore, 375 U.S. 335 23

Page

International Association of Machinists v. Vincent P. Brady (Case No. 16,268, 3rd Cir., 1968) 1, 13
International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963) 15
International Association of Machinists v. National Labor Relations Board, 247 F.2d 414, 420 (2nd Cir., 1957) 27
Johns v. Baltimore & Ohio R. Co., 118 F. Supp. 317 (D.C.N.D. Ill., 1954), aff'd 347 U.S. 964 .....16, 21
McNamar v. Baltimore & Ohio Chicago Terminal R. Co., 254 F.2d 717 (7th Cir., 1958), affirming McNamar v. Baltimore & Ohio Chicago Terminal R. Co., 153 F. Supp. 835 (D.C.N.D. Ind.) 19
Moore v. Illinois Central Railroad Company, 312 U.S. 630 14
National Labor Relations Board v. Technicolor Motion Picture Corp., 248 F.2d 348, 353-354 (9th Cir., 1957) 27
Neal v. System Board of Adjustment, 348 F. 2d 722, 726, 727 (8th Cir., 1965) 19
Pennsylvania R. Co. v. Rychlik, 352 U.S. 480 (1957) .. 16
Pigott v. Detroit, Toledo & Ironton Railroad Company, 221 F.2d 736 (6th Cir., 1955) 16
Shiels v. Baltimore & Ohio R. Co., 254 F.2d 863 (7th Cir., 1958), affirming Shiels v. Baltimore & Ohio R. Co., 154 F. Supp. 917, cert. den. 358 U.S. 846 .. 19
Sigfried v. Pan American World Airways, Inc., 230 F.2d 13 (5th Cir., 1956) 15
Slocum v. Delaware, Lackawanna & Western Railroad Company, 339 U.S. 239 .....14, 22
T.-C.E. Union v. Union Pacific Ry. Co., 385 U.S. 157 .. 22
Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191, 198, 199 (4th Cir., 1963) 15, 18
Thompson v. New York Central R. Co., 316 F.2d 137, 143 (2nd Cir., 1966) 18
Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 .....14, 22
Union Pacific Ry Co. v. Price, 360 U.S. 601 .....14, 22
United Railroad Operating Crafts v. Northern Pacific Railroad Co., 208 F.2d 135 (9th Cir., 1953) 16
United Railroad Operating Crafts v. Pennsylvania Railroad Co., 212 F.2d 938 (7th Cir., 1954) 16

Page

United Railroad Operating Crafts v. Wyer, 115 F. Supp. 359 (D.C.S.D.N.Y., 1953), aff'd 205 F.2d 153 (2nd Cir., 1953), *cert. den.* 347 U.S. 929 16
Walker v. Southern Ry. Co., 385 U.S. 196 .....14, 22
Wooley v. Eastern Air Lines, Inc., 250 F.2d 86, 90, 91 (5th Cir., 1957) 15

STATUTES:

Railway Labor Act (45 U.S.C.A., Secs. 151, et seq.) 3, 4, 5, 6, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25
Railway Labor Act Amendment: Public Law 89-456 (80 Stat. 208) effective June 20, 1966 .....14, 22

MISCELLANEOUS:

United States Code, Title 28, Section 1254(1) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

INTERNATIONAL ASSOCIATION OF MACHINISTS, *Petitioner*,

v.

VINCENT P. BRADY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, the International Association of Machinists[1] (IAM), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in *International Association of Machinists* v. *Vincent P. Brady* (Case No. 16268), on August 13, 1968, affirming a judg-

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[1] During the course of the litigation the name of this organization was changed to "International Association of Machinists and Aerospace Workers".

ment of the United States District Court for the District of Delaware which (1) directs Trans World Airlines, Inc. (TWA), to reinstate Mr. Brady to the position of aircraft mechanic with that air carrier; (2) directs IAM to reinstate Mr. Brady to membership in the union with uninterrupted seniority; and (3) awards Mr. Brady damages against IAM and TWA (Appendix C, page 42a).[2] The District Court's order was based upon findings that Mr. Brady had been discharged from his employment with TWA in violation of the Court's interpretation of union security provisions of a collective bargaining agreement between IAM and TWA (Appendix D, pages 98a-103a).

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix B hereto, is not yet reported. Decisions of the District Court on various phases of this litigation are reported as *Brady* v. *Trans World Airlines,* 156 F. Supp. 82; *Brady* v. *Trans World Airlines,* 167 F. Supp. 469; *Brady* v. *Trans World Airlines,* 174 F. Supp. 360; *Brady* v. *Trans World Airlines,* 196 F. Supp. 504; *Brady* v. *Trans World Airlines,* 223 F. Supp. 361; and *Brady* v. *Trans World Airlines,* 244 F. Supp. 820. There is also a letter opinion of the District Court, dated May 3, 1962, a memorandum opinion of September 6, 1966, and an order of the same date, which are unreported. All of these decisions, both reported and unreported, are reproduced in Appendix D hereto.

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[2] Reference is to pages of separately printed Appendices containing opinions and orders of Court of Appeals and District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1968 (Appendix C hereto). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

In the opinion of the petitioner, the following questions are presented:

1. Does an airline System Board of Adjustment established pursuant to the requirements of Section 204 of the Railway Labor Act (45 U.S.C.A., Section 184) have jurisdiction of a dispute submitted to the board by an airline employee as to whether he has violated the union security provisions of a collective bargaining agreement?

2. Is the determination of an airline System Board of Adjustment established pursuant to the requirements of Section 204 of the Railway Labor Act on the interpretation and application of union security provisions of a collective bargaining agreement submitted to the Board by an airline employee final and binding upon the employee so as to deprive a Federal court of jurisdiction to entertain a suit by the employee praying for a different determination and upon such determination reinstatement to employment with back pay?

3. Assuming *arguendo* that the answers to Questions 1 and 2 are "No", does a Federal district court have jurisdiction to entertain a suit by an airline employee discharged pursuant to union security provisions of a collective bargaining agreement upon the basis of an allegation that local officers of the union discriminated

against the employee in not citing other claimed violators of the union security provisions for discharge when the complaint contains no allegation that the employee invoked internal union appellate procedures to redress the alleged actions of local officers and when such claim was not made by the employee to the System Board of Adjustment established pursuant to Section 204 of the Railway Labor Act when he protested his proposed discharge to that Board?

4. Assuming *arguendo* that the answers to Questions 1 and 2 are "No", does a Federal district court have jurisdiction to entertain a suit by an airline employee discharged pursuant to the union security provisions of a collective bargaining agreement on the basis of an allegation that error in interpreting and applying the agreement constitutes a violation of Section 2, Fourth and 2, Eleventh, of the Railway Labor Act?

5. Did the Court of Appeals err in holding that the union security provisions of the collective bargaining agreement had not been properly applied in the case of an employee where the evidence showed that the employee was four months delinquent in the payment of his dues, the union constitution provided that upon three months' delinquency an employee lost union membership and was required to pay a reinstatement fee for restoration of such membership, and the employee refused to pay such fee?

STATUTES INVOLVED

The statutory provisions involved are Section 2, First; Section 2, Fourth; Section 2, Fifth; Section 2, Seventh; Section 2, Eleventh; and Section 204 of the Railway Labor Act (45 U.S.C.A., Section 152, First,

Fourth, Fifth, Seventh, Eleventh; and Section 184). These statutory provisions are set forth in full in Appendix A hereto.

STATEMENT

On November 20, 1945, the National Mediation Board certified the IAM as the duly authorized representative for the purposes of the Railway Labor Act (45 U.S.C.A., Sections 151 et seq.), of the craft or class of machinists and related employees in the service of TWA. Pursuant to this representation, the IAM negotiated with TWA a collective bargaining agreement governing the rates of pay, rules, and working conditions of such employees which has been amended from time to time. The amended agreement in effect at the time involved in this litigation (Article XXVI) included union security provisions requiring that each employee of TWA covered by the agreement should, as a condition of continued employment, become a member of IAM within sixty days following the beginning of employment and should thereafter maintain membership in the IAM in good standing (Exhibit P-6).[3] The agreement defined good standing membership in the IAM for the purposes of the agreement as consisting of the payment by the employee of union dues for each calendar month not later than the last day of the following calendar month. The agreement also provided that dues should include reinstatement fees levied in accordance with the IAM Constitution. That Constitution provides that a person three months delinquent in the payment of dues loses his good standing membership and must

[3] Reference is to original record in District Court on file with this Court.

pay a reinstatement fee to regain such membership (Exhibit P-7).

The collective bargaining agreement (Article XII) further provided for the establishment of a TWA-IAM System Board of Adjustment in accordance with the requirements of Section 204 of the Railway Labor Act (45 U.S.C.A., Section 184), to determine employee grievances and disputes growing out of the interpretation or application of the agreement, including the union security provisions. The agreement established a procedure for an employee cited for discharge under the union security provisions to appeal such action to the System Board and obtain a determination by the Board on the issue of whether he was in violation of the agreement. Such a determination was required to be made only after a hearing. The agreement finally provided that decisions of the System Board of Adjustment were final and binding upon all of the parties (Exhibit P-6).

Respondent Brady, who had been employed by TWA some years before, again became an employee of that air carrier as an aircraft mechanic at its terminal in the Philadelphia International Airport in 1951 (Trial Transcript, 14 and 15). He then became subject to the provisions of the collective bargaining agreement between IAM and TWA covering the machinist employees of TWA, including the union security provisions. During his prior employment with TWA, he had been a member of the IAM and shortly after his reemployment with TWA in 1951 he reestablished his membership in that organization, joining its Local Lodge 1776 (Trial Transcript, 14 and 15). The monthly dues uniformly required of members of Local Lodge

1776 employed at the Philadelphia International Airport in the work classification to which Mr. Brady belonged were $3.00 per month, which were the lowest for any local lodge in the country. At a meeting of Lodge 1776 on November 2, 1955, the membership voted to increase the monthly dues for the classification to which Mr. Brady belonged, effective with December dues, to the amount of $3.25 per month (Appendix D, page 88a).

Mr. Brady disputed the legality of the procedure followed by the lodge in raising the dues and refused to pay the $3.25 per month. Although repeated efforts were made by the Financial Secretary of the Lodge and other local district lodge officers to get Mr. Brady to pay the dues, he refused to do so (Appendix D, page 88a). Indeed, he was asked by the Local Lodge officers to pay the $3.25 under protest while he perused within the IAM the question of the validity of the increase, but he refused (Trial Transcript, 131-167). He would tender dues payments only at the old rate of $3.00 per month, which tenders were refused by the Local Lodge. This situation continued during the months of December 1955 and January and February 1956 (Trial Transcript, 109).

On February 9, 1956, Mr. Brady wrote to Mr. A. J. Hayes, then International President of the IAM, protesting the dues increase (Trial Transcript, 95). Mr. Hayes by letter, dated February 17, 1956, advised Mr. Brady that the dues increase "was handled properly" by Local Lodge 1776 and therefore was effective beginning with December 1955 (Exhibit D-1). If Mr. Brady was dissatisfied with this ruling, the Constitution of the IAM provided him with a procedure to seek

a ruling from the IAM Executive Council. Indeed, he had the right to appeal the matter to the IAM Grand Lodge Convention, which met in 1956 (Trial Transcript, 174-179, Exhibit P-7, Art. IV, Sec. 6). However, he neither paid the dues nor made any further effort to obtain a ruling on the matter within the union (Trial Transcript, 106-113).

Thereafter on February 15, 1956, Mr. Gerald Coleman, Financial Secretary of Lodge 1776,[4] posted a notice on the union bulletin board at the Philadelphia International Airport listing the nine individuals delinquent in their lodge dues and advising that they must pay up within 10 days or have their names sent to the District Office of the IAM for appropriate action. Mr. Brady's name appeared on this notice as delinquent in payment of dues for December 1955 and January 1956. Mr. Brady was in violation of the union security provisions on February 1, 1956, for failure to pay his dues for December 1955 by the end of January 1956. Mr. Coleman's action in giving Mr. Brady until February 25, 1956, to pay up and avoid citation for violation of such provisions was an act of grace not required by the agreement. Mr. Brady, however, did not pay his dues by February 25, 1956, as specified in Mr. Coleman's notice, and he was still delinquent on March 1, 1956, although each of the other nine listed delinquents promptly paid up (Appendix D, page 89a). Under the terms of the IAM Constitution on that date Mr. Brady was three months delinquent in the payment of dues and could then reestablish union member-

[4] The position was a part time unpaid job filled by a full time airline employee.

ship only by payment of a reinstatement fee of $25.00 (Exhibit P-7, Art. D, Secs. 14 and 15).

On March 3, 1956, Mr. Coleman cited Mr. Brady to the District Lodge of the IAM for dues delinquency (Appendix D, page 89a). Mr. Coleman would not have cited Mr. Brady even at that time if he had expressed any interest in paying his dues. Although other members of the Lodge had opposed the dues raise, Mr. Brady was the only member who refused to pay the dues at the increased rate (Trial Transcript, 232, 233).

At the time Mr. Coleman's letter to District Lodge 142 citing Mr. Brady for dues delinquency was received, Mr. Miller, the General Chairman of the District, was away on a field trip (Appendix D, page 89a). While he was away, his office on March 13, 1956, mailed a letter to Mr. Brady over Mr. Miller's mimeographed signature advising Mr. Brady that he had not complied with the provisions of the IAM-TWA union security agreement and that unless he paid his dues for the months of December 1955, and January, February and March 1956, by midnight of March 28, 1956, he would be discharged from employment by TWA. This letter called for a payment of $13.00 (Exhibit P-3). When Mr. Miller learned of this letter he told Mr. Coleman that, although Mr. Brady was three months delinquent in the payment of dues and hence could restore his good standing in the IAM only by payment of a reinstatement fee, Mr. Coleman should accept payment of the amount of $13.00 called for by the letter of March 13th if tendered and treat Mr. Brady as in good standing (Trial Transcript, 362).

Mr. Brady refused to pay the $13.00 and tendered a check in the amount of $10.50 on March 28, 1956 (Appendix D, page 90a). When Mr. Coleman advised Mr. Miller of this tender, he was told to return the check and to request Mr. Brady to pay a reinstatement fee by April 4, 1956 (Trial Transcript, 249-261). Mr. Coleman returned the check but erroneously requested Mr. Brady to pay both a reinstatement fee and past dues, or $34.75. When General Chairman Miller learned of this he wiped the slate clean [5] and wrote to Mr. Brady, explaining the requirement for a reinstatement fee, and giving him 15 days or until April 25, 1956, to place himself in good standing by the payment of such fee. Mr. Brady refused (Appendix D, page 90a).

Therefore, on May 1, 1956, Mr. Miller certified to TWA that Mr. Brady was in violation of the union security provisions of the collective bargaining agreement and Mr. Brady was advised of the citation (Appendix D, page 90a). On May 5, 1956, Mr. Brady appealed the citation to the System Board pursuant to the agreement and was notified by the Board that hearings thereon would be held before the Board on May 14, 1956.[6] Mr. Brady did not avail himself of the op-

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[5] Before learning of Mr. Coleman's mistake, Mr. Miller had certified to TWA that Mr. Brady was in violation of the union security provisions of the collective bargaining agreement. Upon learning of the error, he withdrew the citation (Trial Transcript, 364, 365; Exhibit P-15).

[6] On April 24, 1956, Mr. Brady prematurely appealed to the System Board. On May 4th the System Board advised him that the appeal was premature but that it would entertain an appeal from Mr. Miller's citation of May 1, 1956, if such appeal were made in accordance with the agreement (Exhibit P-72).

portunity to attend the hearings because of his belief that the System Board had before it all the necessary facts. Following such hearing the System Board decided that Mr. Brady was in violation of the agreement and he was accordingly discharged from employment by TWA effective May 15, 1956 (Complaint, para. 11, Exhibit P-73).

On February 2, 1957, Mr. Brady wrote to the System Board requesting it to reopen the case. This request was based upon a claim that Mr. Miller had not accurately presented the facts to the Board in that he failed to advise the Board that Mr. Brady had tendered the sum of $10.50 on March 27, 1956 (Exhibit P-75). The point was irrelevant because Mr. Brady's discharge had been based upon his failure to pay a reinstatement fee as requested in Mr. Miller's letter of April 11, 1956, and not for his failure to pay $13.00 dues on March 27th. The Board on February 14, 1957, denied Mr. Brady's request (Exhibit P-8).

Thereafter, Mr. Brady began his action in the District Court. His original complaint, filed on April 22, 1957, asked the court to reverse the decision of the System Board, to reinstate Mr. Brady to employment with TWA, and to award damages. This complaint was based upon allegations that Mr. Miller had not accurately presented the facts to the System Board. Subsequently, on December 1, 1958, a Second Amended Complaint was filed, which repeated the original complaint and added a claim for the first time that Mr. Brady had been discriminated against in that other employees of TWA who were in the same or substantially similar position as Mr. Brady with respect to non-payment of dues had not been discharged under

the union security provisions of the agreement.[7] The District Court denied the motions of the IAM and TWA to dismiss both the original and Second Amended Complaints for lack of jurisdiction of the subject matter or for failure to present a claim upon which relief could be granted (Appendix D, pages 57a-80a) and cross-motions of the parties for summary judgment (Appendix D, pages 81a-86a).

Following a trial before the court,[8] the District Court was unable to find any discrimination by IAM against Mr. Brady. However, it did find that Mr. Brady had been improperly discharged under the union shop agreement because it concluded that he was not required to pay more than two months' back dues on March 28, 1956 ($6.50), so that his tender of the $10.50 at that time was sufficient to maintain his membership standing (Appendix D, pages 88a-105a). Thereafter, the District Court, in a separate consideration, determined that Mr. Brady should be awarded back pay in the amount of $10,617.80, and ordered restoration of those fringe benefits to which he would have been entitled had his union membership and employment continued without a break. The District Court denied Mr. Brady's claims for punitive damages, damages for pain and anguish, damages to his

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[7] This Second Amended Complaint was filed after the District Court, on motions of IAM and TWA to dismiss, had indicated that it did not have jurisdiction of the subject matter of the original complaint since it did not raise a Federal question and diversity of citizenship was lacking (Appendix D, pages 63a, 64a). Moreover, no such claim had been made to the System Board (Exhibit D-3).

[8] The District Court granted the IAM motion to strike plaintiff's demand for a jury trial (Appendix D, page 86a).

wife, damages for value of airline passes, and attorneys' fees (Appendix D, pages 106a-115a).

Mr. Brady appealed the judgment of the District Court in Case No. 16,266 before the Court of Appeals. IAM cross-appealed in Case No. 16,268 and TWA also cross-appealed in Case No. 16,267. The Court of Appeals consolidated the appeals for hearing. On August 13, 1968, the Court of Appeals issued its opinion and judgment affirming the judgment of the District Court (Appendix B hereto).

REASONS FOR GRANTING WRIT

I

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER

A. The decision of the Court of Appeals conflicts with decisions of other Courts of Appeals on the jurisdiction of the Railway Labor Act Adjustment Boards to interpret and apply union security provisions of a collective bargaining agreement.

Mr. Brady voluntarily appealed his proposed discharge for violation of the union security provisions of the applicable collective bargaining agreement to the TWA-IAM System Board of Adjustment established by such agreement to entertain employee grievances arising thereunder or employee claims concerning the interpretation and application of the agreement, including its union security provisions. The agreement made System Board decisions final and binding. The establishment of this Board was required by the provisions of Section 204 of the Railway Labor Act (45 U.S.C.A., Section 184). Under those provisions its jurisdiction is the same as the jurisdiction of the Na-

tional Railroad Adjustment Board established by Section 3 of the statute whose decisions are also made final and binding by statute (45 U.S.C.A., Section 153). The System Board decided that Mr. Brady was in violation of the union security provisions of the agreement and subject to discharge thereunder.

Mr. Brady was not required to make this appeal. He could have treated his discharge as final and sued in an appropriate state court for money damages if the state court would recognize such a claim.[9] *Moore* v. *Illinois Central Railroad Company,* 312 U.S. 630; *Transcontinental & Western Air, Inc.* v. *Koppal,* 345 U.S. 653; *Walker* v. *Southern Ry. Co.,* 385 U.S. 196. However, he chose to seek retention of his employment. This can be done only by submission of the contract dispute to an adjustment board. Once an adjustment board has denied the claim it is final and binding on the employee. *Slocum* v. *Delaware, Lackawanna & Western Railroad Company,* 339 U.S. 239; *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.,* 353 U.S. 30, *Union Pacific Co.* v. *Price,* 360 U.S. 601. Public Law 89-456 (80 Stat. 208), effective June 20, 1966, provides limited judicial review for railroad adjustment board decisions which does not include a review of the merits of the award. *Brotherhood of Railroad Trainmen* v. *Denver & Rio Grande Western Railroad,* 370 F.2d 833 (10th Cir., 1966), *cert. den.* 386 U.S. 1018. The System Board decision denying Mr. Brady's claim was thus final and binding

[9] He could also have sued in a Federal court under Title 28, Section 1332 of the Judicial Code, if the required diversity of citizenship were present.

on him and not subject to judicial review or a Slocum type claim.[10]

The Court of Appeals in the present case held, however, that the decision of the System Board was not final and binding on Mr. Brady on the ground that such board did not properly have jurisdiction of his appeal. It found that the jurisdiction of the System Board was limited by the Railway Labor Act to disputes between an employee and a carrier and that Mr. Brady's grievance arising out of the application of the union security provisions of the collective bargaining agreement was not such a dispute, but only a dispute between an employee and a union. (Appendix B, pages 12a-14a.)

This holding directly conflicts with decisions of other Courts of Appeals sustaining the exclusive jurisdiction of adjustment boards to entertain and decide disputes involving the interpretation and application of union security provisions of collective bargaining agreements where the employee seeks a continuing employment relationship. *Battle* v. *Brotherhood of Railway and Steamship Clerks,* 320 F.2d 742 (D.C. Cir., 1963); *Alabaugh* v. *Baltimore & Ohio R. Co.,* 222 F.2d 861 (4th Cir., 1955), *cert. den.* 350 U.S. 839;[11]

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[10] It is clear that Section 204 of the Railway Labor Act creates the same statutory scheme for resolving employee grievances as well as interpreting and applying collective bargaining agreements as does Section 3 of the Railway Labor Act. *International Association of Machinists* v. *Central Airlines, Inc.,* 372 U.S. 682 (1963); *Wooley* v. *Eastern Air Lines, Inc.,* 250 F.2d 86, 90, 91 (5th Cir., 1957); *Sigfried* v. *Pan American World Airways, Inc.,* 230 F.2d 13 (5th Cir., 1956); *Bower* v. *Eastern Air Lines, Inc.,* 214 F.2d 623 (3rd Cir., 1954).

[11] In *Thompson* v. *Brotherhood of Sleeping Car Porters,* 316 F.2d 191, the Fourth Circuit modified *Alabaugh* to uphold court jurisdiction of a discrimination claim except claims arising under a valid union shop agreement. (See pages 198, 199.)

Pigott v. *Detroit, Toledo & Ironton Railroad Company,* 221 F.2d 736 (6th Cir., 1955); *United Railroad Operating Crafts* v. *Pennsylvania Railroad Co.* 212 F.2d 938 (7th Cir., 1954) *United Railroad Operating Crafts* v. *Northern Pacific Railroad Co.,* 208 F.2d 135 (9th Cir., 1953); *United Railroad Operating Crafts* v. *Wyer,* 115 F. Supp. 359 (D.C.S.D.N.Y., 1953), aff'd 205 F.2d 153 (2d Cir., 1953), *cert. den.* 347 U.S. 929; *Johns* v. *Baltimore & Ohio R. Co.,* 118 F. Supp. 317 (D.C.N.D. Ill., 1954), aff'd 347 U.S. 964.[12]

Nor is this conflict erased by a claim that the Second Amended Complaint alleged discrimination in the application of the union shop agreement. The employee claim as presented to the System Board was based solely on the adequacy of the employee's tender of March 27, 1956. No claim of discrimination was made

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[12] The *United Railroad Operating Crafts* cases involved decisions holding that railroad adjustment boards had jurisdiction to pass on a defense to a discharge under a union shop agreement that the employee involved was a member of a union "national in scope" within the meaning of Section 2, Eleventh, of the Railway Labor Act and so exempt from joining the citing union. In *Pennsylvania R. Co.* v. *Rychlik,* 352 U.S. 480 (1957), This Court, without passing on the jurisdiction of adjustment boards to determine whether a union was "national in scope", as required by Section 2(c), of the Railway Labor Act, affirmed dismissal of a complaint by a railroad employee discharged pursuant to union security provisions of a collective bargaining agreement who contended he met statutory standards of membership in a union "national in scope." It did so on the ground that there was available an administrative procedure to obtain such a classification which the union in question had not utilized. This decision in no way detracted from the basic holdings of the Second, Sixth, Seventh and Ninth Circuits that adjustment boards had jurisdiction of disputes arising under the union security provisions of collective bargaining agreements involving the interpretation and application of such agreements.

(Exhibit D-3).[13] The ruling of the Court of Appeals that the System Board did not have jurisdiction of such a claim must necessarily rest on a ground that boards of adjustment do not have jurisdiction of disputes arising under union security provisions of collective bargaining agreements involving the interpretation and application of such agreements. Nor did the Court of Appeals seek to draw any distinction between jurisdiction of a Railway Labor Act adjustment board of a dispute over the interpretation and application of the union security provisions of a collective bargaining agreement in cases where a claim of discrimination is made and cases where one is not made.[14]

Moreover, any such attempted distinction would not have removed conflict with decisions of other Courts of Appeals. In *Alabaugh* v. *Baltimore & Ohio R. Co.*, 222 F.2d 861, *cert. den.* 350 U.S. 839, the Fourth Circuit held that a claim of discrimination in the application of union security provisions did not take away the jurisdiction of adjustment boards over disputes concerning the interpretation and application of such agreements. That Circuit's subsequent decision in *Thompson* v. *Brotherhood of Sleeping Car Porters,*

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[13] Indeed the discrimination claim was nothing more than a thinly disguised effort to provide a theoretical basis for Federal court jurisdiction after it was clear the original complaint would be dismissed, *supra*, page 12, footnote 7. It was not founded on facts and neither the District Court nor the Court of Appeals was able to find any discrimination. Mr. Brady simply refused to pay the increased dues when all other members complied.

[14] It should also be observed that the Court of Appeals held that before a suit against IAM could be brought alleging discrimination by local officials, it was necessary for Mr. Brady to exhaust his internal union remedies (Appendix B, page 37a).

316 F.2d 191 (1963), modifying *Alabaugh,* excluded valid union shop agreements from its ambit (pages 198, 199). In addition, in *Thompson* v. *New York Central R. Co.,* 361 F.2d 137 (1966), the Second Circuit held that adjustment boards have jurisdiction of employee claims of discrimination where the claim turns, as it does in this case, upon questions of the interpretation and application of a collective bargaining agreement.

Insofar as the Court of Appeals relies upon the makeup of adjustment boards for its holding (Appendix B, page 14a), it is also in conflict with both the Fourth Circuit *Alabaugh* decision (page 867) and the Second Circuit *Thompson* decision (page 143, footnote 7).

B. The holding of the Court of Appeals that the claim of discrimination in the amended complaint raises a Federal question conflicts with decisions of other Courts of Appeals on this point.

After the Court of Appeals ruled that the determination of the TWA-IAM System Board of Adjustment was not final and binding on Mr. Brady, it was still faced with the question of whether or not there was Federal jurisdiction to entertain Mr. Brady's complaint (Appendix B, page 16a). In the absence of diversity that complaint was based upon a claim of a Federal question under Title 28, Section 1331 and 1337. The Court of Appeals held that such a question was presented in the claim of the Second Amended Complaint that Mr. Brady had been discriminated against in the application of the union security provisions of the collective bargaining agreement by local union officials in not citing other employees of TWA al-

leged to be similarly delinquent (Appendix B, page 106a).

This holding of the Court of Appeals conflicts with decisions of the United States Court of Appeals for the Seventh Circuit holding that violations of union security provisions by some union members do not protect from discharge another member who has violated such provision. *McNamar* v. *Baltimore & Ohio Chicago Terminal R. Co.*, 254 F.2d 717 (1958), affirming *McNamar* v. *Baltimore & Ohio Chicago Terminal R. Co.*, 153 F. Supp. 835 (D.C.N.D. Ind.); *Shiels* v. *Baltimore & Ohio R. Co.*, 254 F.2d 863 (1958), affirming *Shiels* v. *Baltimore & Ohio R. Co.*, 154 F. Supp. 917, *cert. den.* 358 U.S. 846.

C. The Court of Appeals decision conflicts with decisions of other Courts of Appeals holding that a union member must exhaust internal union remedies before he can sue his union for alleged discrimination.

The allegation in the amended complaint that local officers of the IAM had discriminated against Mr. Brady in the application of the union security provisions of the collective bargaining agreement did not allege that Mr. Brady had either exhausted his available internal union remedies to obtain redress from higher union officials or tribunals or that it was futile for him to do so. The decision of the Court of Appeals holding that the amended complaint raised a Federal question by its claim of discrimination also conflicts with decisions of the United States Court of Appeals for the Eighth Circuit in *Neal* v. *System Board of Adjustment*, 348 F.2d 722, 726, 727 (1965), and of the Fifth Circuit in *Fingar* v. *Seaboard Airline Railroad Company, et al.*, 277 F.2d 698 (1960), holding

that resort to internal union remedies, or an adequate reason for failure to do so, is a prerequisite to relief against a union or its officers in the Federal courts on a claim of discrimination. Indeed, the decision of the Court of Appeals conflicts with its own earlier decision in *Gainey* v. *Brotherhood of Railway and Steamship Clerks, et al.*, 275 F.2d 342, 345 (1960), in which the Court of Appeals sustained *a dismissal of a complaint* under the Railway Labor Act against a union alleging discrimination on the grounds of failing to allege exhaustion of internal union remedies. The Court of Appeals holding in the *Gainey* case read as follows (page 345):

> "Whether or not plaintiffs' allegations against the Brotherhood are sufficient to state a cause of action under the Railway Labor Act and the line of cases stemming from Steele v. Louisville & N. R. R., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, we need not decide here. The reason is that the plaintiffs have failed to allege exhaustion of their remedies within the union or an adequate reason for failure to do so. They say that their complaint 'has gone unheeded by all echelons of the Brotherhood since 1951,' but nowhere is there an allegation that they have attempted to pursue remedies available to them within the Brotherhood's internal structure. Recent Pennsylvania decisions show us that this Brotherhood does indeed provide internal remedies which appear adequate. *In a case as this, exhaustion of internal union remedies (absent an adequate reason for failure to do so) is a prerequisite to suit.* Both Pennsylvania and Federal authorities support this conclusion." (Emphasis supplied)

Curiously enough, the Court of Appeals also holds that it is a general rule, and the rule of the Third

Circuit, that before a suit against a union for breach of its duty of fair representation may be brought in the courts, a member must first exhaust his available internal union remedies or show an adequate reason for failing to do so citing the *Gainey* case. The Court of Appeals therefore holds that since there was no allegation or evidence that Mr. Brady had exhausted his internal union remedies to redress unfair treatment by local union officers Mr. Brady could not recover on his alleged discrimination claim (Appendix B, pages 37a, 38a).

II

THE COURT OF APPEALS DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

A. The decision of the Court of Appeals that Railway Labor Act adjustment boards do not have jurisdiction of disputes over the interpretation and application of collective bargaining agreements conflicts with the decision of this Court in *Johns* v. *Baltimore & Ohio R. Co., et al.*, 347 U.S. 964, affirming a decision of a three-judge court (*Johns* v. *Baltimore & Ohio R. Co.*, 118 F. Supp. 317), holding that such adjustment boards do have such jurisdiction.

B. Mr. Brady has here sought a continuation of his employment relationship with TWA and the award of back pay and other benefits attached to that employment based on a claim that he was improperly cited for discharge by IAM and improperly discharged by TWA under the union security provisions of the collectice bargaining agreement between TWA and IAM. The Court of Appeals decision to the effect that Federal courts have jurisdiction to entertain such a claim and grant such relief conflicts with decisions of this

Court holding that Railway Labor Act adjustment boards have exclusive jurisdiction of such a claim and that awards of an adjustment board with respect thereto are final and binding on the employee. *Slocum* v. *Delaware, Lackawanna & Western Ry. Co.,* 339 U.S. 239; *Transcontinental & Western Air, Inc.* v. *Koppal,* 345 U.S. 653; *Walker* v. *Southern Ry. Co.,* 385 U.S. 196; *Union Pacific Ry. Co.* v. *Price,* 360 U.S. 601.

III

THE COURT OF APPEALS DECISION RAISES SUBSTANTIAL AND IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

A. The decision raises substantial and important questions of Federal law with respect to the jurisdiction of Railway Labor Act adjustment boards.

This Court has heretofore interpreted the Railway Labor Act as establishing a statutory scheme for final and binding determinations by adjustment boards of employee grievances and disputes concerning the interpretation of collective bargaining agreements. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.,* 353 U.S. 30; *Slocum* v. *Delaware, Lackawanna & Western R. Co.,* 339 U.S. 239. The only exception involves discharge cases where the employee accepts his discharge as final in which case he may sue for damages if applicable state law so permits. *Transcontinental & Western Air, Inc.* v. *Koppal,* 345 U.S. 653; *Walker* v. *Southern Ry. Co.,* 385 U.S. 196. The 1966 amendments to the Railway Labor Act permit limited judicial review of adjustment board awards which does not include review of the merits. This Court has only recently included in this statutory scheme jurisdictional work disputes between unions. *T.-C.E. Union* v. *Union Pacific Ry. Co.,* 385 U.S. 157.

The Court of Appeals decision takes out of this statutory scheme all disputes concerning the interpretation and application of union security provisions of collective bargaining agreements and removes from adjustment board jurisdiction all such disputes even where the employee seeks a continuing employment relationship. The creation of such a hole in the statutory scheme for adjustment board review of employee grievances raises important questions of Federal law which this Court should review. The impact of this decision on the statutory scheme for resolving employee grievances can be seen in the fact that the IAM alone has some 48 collective bargaining agreements executed pursuant to that statute containing security provisions similar to those here involved which cover some 57,269 employees of air transport companies.

B. The decision raises substantial and important questions of Federal jurisdiction.

The Court of Appeals bases Federal jurisdiction to interpret and apply the union security provisions of the collective bargaining agreement here involved upon the allegations in the Second Amended Complaint of discrimination against Mr. Brady and violation of his rights under Section 2, Fourth and Eleventh of the Railway Labor Act. Both of these findings raise substantial Federal questions (Appendix B, pages 16a-20a).

1. Contrary to the statements in the Court of Appeals decision, the amended complaint did not allege "hostile and invidious" discrimination required by the decisions of this Court as a basis for Federal jurisdiction. *Huffman* v. *Ford Motor Co.,* 345 U.S. 330; *Humphrey* v. *Moore,* 375 U.S. 335. Not only was such

a claim not made but the only factual allegations in the complaint in support of an allegation of discrimination were (a) a refusal to accept Mr. Brady's inadequate tender of March 28, 1956, (b) an alleged failure to notify Mr. Brady that he was two months delinquent in the payment of dues, and (c) that other employees of TWA who also violated the agreement were not discharged. Moreover, these claims had never been advanced by Mr. Brady to the union at any time, had not been advanced to the System Board of Adjustment, were not advanced until the case had been in litigation for some 18 months and were without foundation in fact, as shown by the inability of either the District Court or Court of Appeals to find any discrimination, much less "hostile and invidious" discrimination. It is respectfully submitted that basing Federal jurisdiction to interpret and apply a collective bargaining agreement upon such a basis raises substantial questions as to whether Federal jurisdiction can and should be so invoked.

2. The alternative basis for Federal jurisdiction suggested by the Court of Appeals is that the amended complaint alleged violations of Mr. Brady's rights under Section 2, Fourth and Eleventh of the Railway Labor Act and thus raised a Federal question. This conclusion is reached by the process of holding that if a union and a carrier err in interpreting and applying the union security provisions of a collective bargaining agreement such error per se constitutes a violation of the Railway Labor Act (Appendix B, pages 18a-20a). If the rationale of the Court of Appeals were sound, any minor dispute involving the interpretation and application of a collective bargaining agreement would constitute a dispute concerning a violation of

the Railway Labor Act and hence a basis for Federal jurisdiction since the failure to abide by such an agreement constitutes a violation of Section 2, Fourth and Seventh of that statute and would negate the entire statutory scheme for the resolution of such minor disputes by adjustment boards. It is submitted that the Court of Appeals holding raises a substantial and important Federal question with respect to Federal jurisdiction of Railway Labor Act collective bargaining agreements.

IV

THE COURT OF APPEALS DECISION ERRS IN SUBSTANTIAL AND IMPORTANT RESPECTS

The District Court found, and the Court of Appeals affirmed, that Mr. Brady's tender to the Financial Secretary of Local Lodge 1776 of $10.50 on March 28, 1956, was sufficient to maintain his good standing membership in the IAM, so that he was not required to pay a reinstatement fee when it was demanded of him on April 18, 1956, and hence he was not subject to discharge under the union security provisions of the collective bargaining provisions of the collective bargaining agreement (Appendix B, pages 21a-26a). This conclusion is based upon a finding that a three months' delinquency invoking the requirements for a reinstatement fee did not occur until March 31, 1956, rather than on March 1st as contended by the IAM. Thus, the Court of Appeals concludes that on March 27, 1956, although Mr. Brady had not paid any dues for the preceding months of December, January, and February, nor any dues for the month of March, he was not delinquent only in the payment of his December, 1955, and January, 1956 dues. (Appendix B, pages 21a-26a).

The uncontradicted evidence of record is that under the IAM constitution monthly dues are required to be paid on the first day of the month and that failure to do so makes the member delinquent for that month (Heisler Affidavit and Exhibits thereto). Thus, under the provisions of the constitution Mr. Brady was three months delinquent on March 1, 1956, and at that time was required to pay a reinstatement fee in order to maintain his union standing. The Court of Appeals finds, however, that the union security provisions of the collective bargaining agreement providing for citation if one month's dues are not paid by the end of the second month modifies the IAM constitutional provision so that a three months' delinquency does not occur until the end of the fourth month. Such reasoning is clearly erroneous.

The provision in the union shop agreement postponing a month's delinquency to the next month is clearly applicable only when a citation is based on a single month's delinquency. Paragraph (n) of the union security provisions (Exhibit P-6, Art. XXVI) also defines the term "dues" under the agreement as including a reinstatement fee levied in accordance with the IAM constitution. This is obviously intended to take care of a situation, as here, where an employee is not cited for a delinquency of one month at the end of the second month, but the delinquency continues until such time as he has lost membership in the union under the IAM constitution and must pay a reinstatement fee. The Court of Appeals decision (Appendix B, page 27a) says, however, that the employee is entitled to clear notice of his responsibilities. Such notice was given to Mr. Brady in the present case in that he was not finally cited until May 1, 1956,

and not then until he had been given the 15 days provided by the union security provisions of the agreement to pay a reinstatement fee, the situation had been carefully explained to him and he had refused. Mr. Brady did not at that time complain of any lack of notice. Nor did he even claim that it was not proper to request a reinstatement fee. He simply did not want to pay one (Exhibit P-19). The reasoning of the Court of Appeals is also inconsistent with its finding (Appendix B, page 37a) that Mr. Brady was a shop steward knowledgeable of union procedures and hence accountable for failure to utilize such procedures.

Assuming *arguendo* that the three months' delinquency for reinstatement under the IAM Constitution did not occur until the end of March 1956, nevertheless Mr. Brady clearly violated the provisions of the union shop agreement by refusing to pay his dues for December 1955 and January 1956 before the end of February 1956, and had no complaint because he was cited and dismissed under such agreement. *International Association of Machinists* v. *National Labor Relations Board,* 247 F.2d 414, 420 (2nd Cir., 1957); *National Labor Relations Board* v. *Technicolor Motion Picture Corp.,* 248 F.2d 348, 353-354 (9th Cir., 1957).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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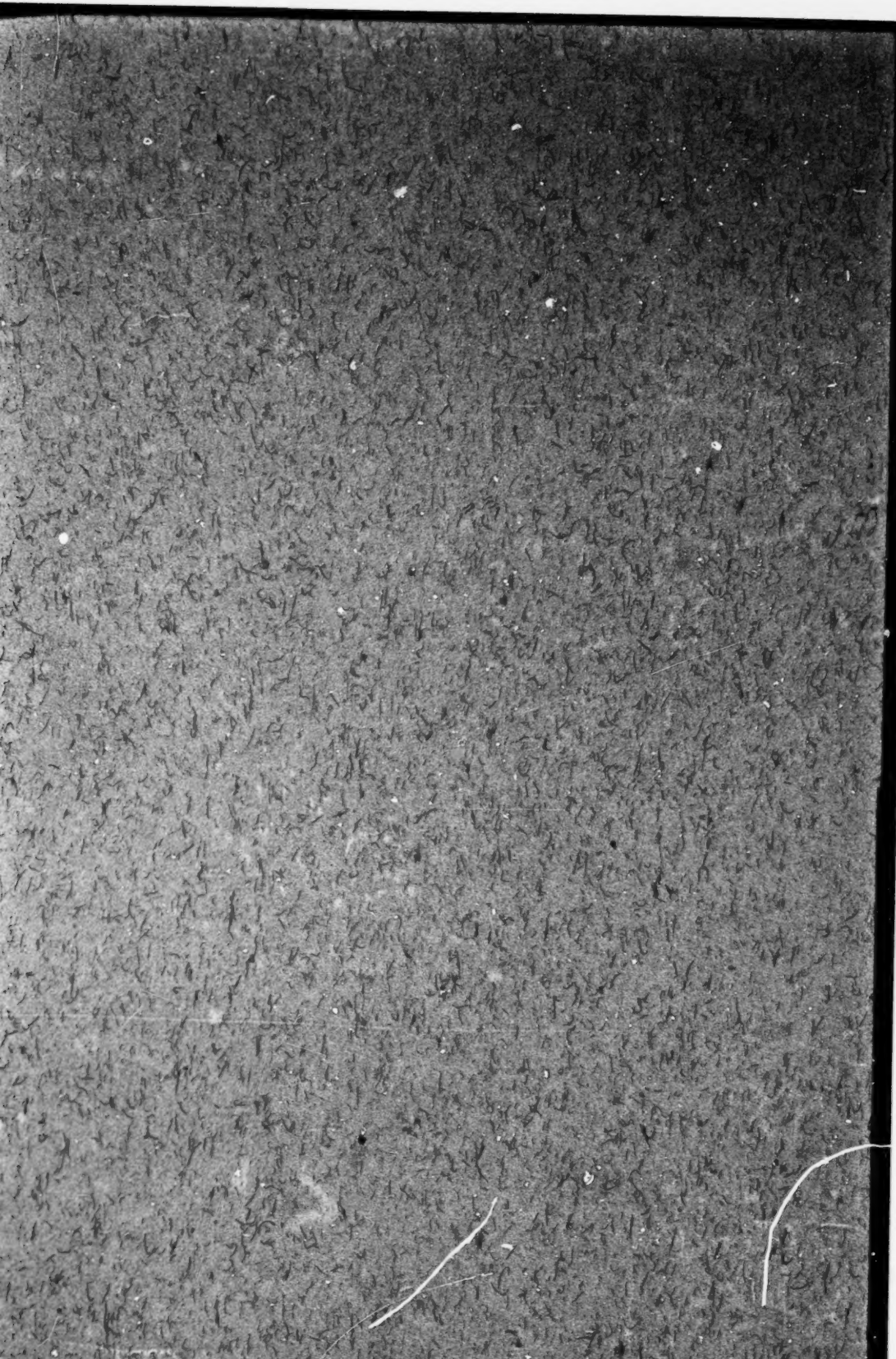

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 713

VINCENT P. BRADY,

Respondent,

—against—

TRANS WORLD AIRLINES, INC.,

Petitioner,

~~and~~

~~THE INTERNATIONAL ASSOCIATION OF MACHINISTS.~~

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 3

Brady's Refusal to Pay Dues 4

The IAM Discharge Certification 5

The System Board Hearings 5

The Holdings of the District Court 6

The Holding of the Court of Appeals 8

Reasons for Granting the Writ 9

Conclusion 19

Table of Authorities

Cases:

Alabaugh v. Baltimore & Ohio R.R., 222 F. 2d 861 (4th Cir.), *cert. denied,* 350 U. S. 839 (1955) 10

Battle v. Brotherhood of Ry. and S.S. Clerks, 320 F. 2d 742 (D. C. Cir. 1963) 10

Brady v. Trans World Airlines, Inc., 223 F. Supp. 361 (D. Del. 1963) 6

PAGE

Brady v. Trans World Airlines, Inc., 244 F. Supp. 820 (D. Del. 1965) 7

Cunningham v. Erie R.R., 266 F. 2d 411 (2nd Cir. 1959) 11, 12, 13
Cunningham v. Erie R.R., 358 F. 2d 640 (2nd Cir. 1966) 13

Humphrey v. Moore, 375 U. S. 335 (1964) 18

IAM v. Central Airlines, Inc., 372 U. S. 682 (1963) 5, 16, 18

Johns v. Baltimore & Ohio R.R., 118 F. Supp. 317 (N. D. Ill. 1954), *aff'd per curiam,* 347 U. S. 964 (1954) 10

Krambo Food Stores, Inc., 114 N. L. R. B. 241 (1955), *aff'd sub nom.* NLRB v. Allied Independent Union, 238 F. 2d 120 (7th Cir. 1956) 18

Moore v. Illinois Central R.R., 312 U. S. 630 (1941) 15

NLRB v. Leece-Neville Co., 330 F. 2d 242 (6th Cir.), *cert. denied,* 379 U. S. 819 (1964) 18
NLRB v. Pape Broadcasting Co., 217 F. 2d 197 (5th Cir. 1954) 18

Order of Ry. Conductors v. Pitney, 326 U. S. 561 (1946) 11
Order of Ry. Conductors v. Southern Ry., 339 U. S. 255 (1950) 11

PAGE

Pigott v. Detroit, T. & I. R.R., 221 F. 2d 736 (6th Cir. 1955) 10, 12
Producers Transport, Inc. v. NLRB, 284 F. 2d 438 (7th Cir. 1960) 18

Republic Steel Corp. v. Maddox, 379 U. S. 650 (1965) 17
Rychlik v. Pennsylvania R.R., 229 F. 2d 171 (2nd Cir. 1956), *rev'd on other grounds,* 352 U. S. 480 (1957) 11, 12

Slocum v. Delaware, L. & W. R.R., 339 U. S. 239 (1950) 11, 15, 16

Thompson v. New York Cent. R.R., 361 F. 2d 137 (2nd Cir. 1966) 11
Transcontinental & Western Air, Inc. v. Koppal, 345 U. S. 653 (1953) 15

United R.R. Operating Crafts v. Northern Pacific R.R., 208 F. 2d 135 (9th Cir. 1953), *cert. denied,* 347 U. S. 929 (1954) 10
United R.R. Operating Crafts v. Pennsylvania R.R., 212 F. 2d 938 (7th Cir. 1954) 10
United R.R. Operating Crafts v. Wyer, 115 F. Supp. 359 (S. D. N. Y.), *aff'd,* 205 F. 2d 153 (2nd Cir. 1953), *cert. denied,* 347 U. S. 929 (1954) 10, 11

Vaca v. Sipes, 386 U. S. 171 (1967) 18

Walker v. Southern Ry., 385 U. S. 196 (1966) 9, 15, 16

PAGE

Statutes:

Labor Management Relations Act

61 Stat. 140, as amended, 73 Stat. 535, 29 U. S. C. §158(a)(3) 18

Railway Labor Act

44 Stat. 577, as amended, 45 U. S. C. §§151 et seq. 3

49 Stat. 1189, 45 U. S. C. §§181 et seq. 3

Section 2, Eleventh 17, 18

Section 2, 45 U. S. C. §151a 14

Section 3, Second 12

Section 3, 45 U. S. C. §153 10

Section 204, 49 Stat. 1189, 45 U. S. C. §184 ..... 5, 9, 10

1950 U. S. Code Cong. Serv. 4321 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

VINCENT P. BRADY,

Respondent,

—against—

TRANS WORLD AIRLINES, INC.,

Petitioner,

and

THE INTERNATIONAL ASSOCIATION OF MACHINISTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Trans World Airlines, Inc. ("TWA"), prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment in this case.

Opinions Below

The opinion of the Court of Appeals is not reported (Opinions 6a).[1] Of the opinions of the District Court de-

[1] References to "(Opinions .....)" are to the jointly-prepared Opinions Delivered in the Courts Below which are voluminous and are, therefore, being separately presented.

termining liability and relief, the opinion of November 4, 1963 is reported at 223 F. Supp. 361 (Opinions 88a), the opinion of September 3, 1965 is reported at 244 F. Supp. 820 (Opinions 106a) and the opinion of September 6, 1966 is unreported (Opinions 111a). Earlier opinions of the District Court are reported at 156 F. Supp. 82 (Opinions 43a), 167 F. Supp. 469 (Opinions 57a), 174 F. Supp. 360 (Opinions 67a) and 196 F. Supp. 504 (Opinions 81a); a letter opinion dated May 3, 1962 is unreported (Opinions 87a).

Jurisdiction

The judgment of the Court of Appeals, set forth in Appendix A, *infra,* was entered August 13, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Is a System Board of Adjustment established under the Railway Labor Act ousted from jurisdiction over an employee's grievance because the grievance involves a complaint of wrongful discharge pursuant to the union-security provisions of a collective bargaining agreement?

2. May an airline employee discharged pursuant to the union-security provisions of a collective bargaining agreement authorized by the Railway Labor Act obtain reinstatement in employment otherwise than under the administrative procedures established by such collective bargaining agreement?

3. May a federal court set aside a final and binding decision of a Railway Labor Act System Board of Adjustment upholding the discharge of an airline employee for failure to maintain membership in good standing in his union in the absence of any finding by the court that the System Board had denied the employee a fair hearing or otherwise acted improperly?

4. Does an airline automatically violate the Railway Labor Act when, pursuant to a lawful collective bargaining agreement and in good faith reliance on union certification, it complies with a Railway Labor Act System Board of Adjustment decision and discharges an employee for failure to maintain membership in good standing in his union if a court later determines that without the airline's knowledge the union had improperly rejected the employee's tender of his dues?

Statutes Involved

Relevant provisions of the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. §§151 *et seq.* ("the Act"), are set forth in Appendix B, *infra.*

Statement of the Case

The basic facts are not in dispute. TWA is an air carrier subject to Title II of the Act, 49 Stat. 1189, 45 U. S. C. §§181 *et seq.* Respondent, Vincent P. Brady ("Brady"), was, prior to his discharge on May 15, 1956, a mechanic employed by TWA at its Philadelphia station. At that time Brady was a shop steward and member of the

International Association of Machinists ("the IAM"), the certified collective bargaining agent for TWA's mechanics.

The collective bargaining agreement between TWA and the IAM ("the Agreement") contained a union-security provision requiring that employees maintain "membership in good standing" in the IAM by paying "dues for each calendar month not later than the last day of the following calendar month" (316a-317a).[2]

Brady's Refusal to Pay Dues

Protesting the propriety of a 25¢ a month increase in the IAM dues, Brady refused to pay his dues for December 1955 and January, February and March 1956.[3] As a result the IAM advised Brady on March 13, 1956 that he would be subject to discharge if he did not pay the dues for these four months, totaling $13, by March 28, 1956 (306a-307a). When Brady tendered only $10.50 on March 27, 1956, the IAM rejected the tender as insufficient and demanded that Brady pay a reinstatement fee of $25 by April 26, 1956 (340a-341a).[4]

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[2] References to "(.....a)" are to the pages of the Joint Appendix of TWA and IAM filed with the Court of Appeals and included in the record certified by the clerk of that Court being filed with this petition.

[3] Subsequently, Brady characterized his argument with the IAM as follows:

> "I believe you know that my argument in this case hasn't been the refusal to pay my dues, but what I considered to be the proper amount due to the events leading up to the raising the dues and actions on the lodge floor afterwards" (297a).

[4] TWA was not advised of Brady's tender.

The IAM Discharge Certification

Brady ignored the IAM demand. Anticipating that he would be certified for discharge, he appealed on April 24, 1956 to the System Board of Adjustment established by Article XXVI of the Agreement (267a-268a).[5] On April 30, 1956 the IAM certified to TWA that Brady had failed to make the necessary payment and should be discharged in accordance with the terms of the Agreement (301a).

The System Board Hearings

A hearing on Brady's appeal was held on May 4, 1956. Although he had notice, Brady failed to appear (21a, 286a). Since Brady's appeal of April 24 antedated the IAM discharge certification of April 30, the System Board concluded that Brady's appeal "was not properly before this Board" (270a, 358a).

The Vice Chairman and Chairman of the System Board telephoned Brady at the conclusion of the May 4 hearing to advise him of the Board's decision and to further advise him that an appeal of his discharge would be heard if Brady mailed a new appeal. This telephone conversation was confirmed by a special delivery letter (358a).

In accordance with a request by Brady a second hearing was held on May 14, 1956. Once again, despite notice, Brady failed to appear (21a, 287a).

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[5] The System Board of Adjustment was established under the Agreement pursuant to the statutory duty under Section 204 of the Railway Labor Act (49 Stat. 1189, 45 U. S. C. §184) "of establishing and utilizing system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes arising under existing contracts." *IAM* v. *Central Airlines, Inc.*, 372 U. S. 682, 686 (1963).

The full transcript of the second hearing is set forth in the Joint Appendix of TWA and IAM below (287a-305a). The undisputed evidence before the Board showed that the IAM had afforded Brady repeated opportunities to pay his union obligations but Brady had refused to make such payment. The record included a written admission by Brady that he was in default as follows:

> "This is to inform you that I am willing to make the payment of my dues, as I have demonstrated on a number of occasions in the past. I will pay the amount that the rest of the fellows are now paying dating back to December to the present time" (297a).

Based upon this undisputed evidence and Brady's admission, the System Board on May 14, 1956 held that Brady's discharge should be upheld (361a). Under the Agreement the decision of the System Board was "final and binding on all parties concerned" (320a).

The Holdings of the District Court

On April 22, 1957, Brady commenced the present action in the United States District Court for the District of Delaware. Jurisdiction was premised on 45 U. S. C. 181 and 152 and 28 U. S. C. 1331 and 1337. On November 4, 1963, the District Court held Brady "entitled to compensatory damages and reinstatement" (248a).[6] No issue was submitted by Brady at the trial and no evidence was offered as to any alleged fault of TWA or as to any alleged

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[6] *Brady* v. *Trans World Airlines, Inc.*, 223 F. Supp. 361, 370 (D. Del. 1963) (Opinions 88a, 105a). The District Court made no finding on Brady's basic contention that his discharge "was prompted by the Union's hostile discrimination against him". The record would not support a finding of hostile discrimination since only Brady refused to pay the increased dues (167a, 198a).

knowledge by TWA of the claimed wrongful acts of the IAM (121a-127a; 223a-227a).

Misreading the Agreement and the IAM Constitution,[7] the District Court held that the IAM's demand that Brady pay four months' dues by March 28, 1956, was excessive since, as the Court reasoned, Brady "owed only two months dues" (243a).

The District Court further held that Brady's tender on March 27, 1956 of $10.50 precluded his discharge, since under the District Court's reasoning only two months' dues totaling $6.50 was then due.

Since the Court had severed the trial of the liability issues from the damage questions, it dealt with the question of damages in a decision rendered September 3, 1965 (250a).[8]

After further hearings, the District Court on September 6, 1966, entered final judgment directing Brady's reinstatement in TWA's employ as well as restoration of his union membership and awarded him back pay of $10,617.80 (402a-403a). The Court further ordered that Brady be reinstated in TWA's retirement program by his contributing "the sum which he would have contributed over the period as well as having TWA contribute its share" (401a).

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[7] Under the IAM Constitution [Article E, Sec. 14 (329a)] delinquency for three months in the payment of dues automatically cancels membership. No grace period is provided. Hence Brady's membership was automatically cancelled on March 1, 1956 when he had failed to pay the prior three months' dues. The District Court would amend the IAM Constitution by adding a grace period. While TWA is not privy to the IAM Constitution, under either the Agreement or the Constitution Brady's union membership had terminated by March 1, 1956.

[8] *Brady* v. *Trans World Airlines, Inc.*, 244 F. Supp. 820 (D. Del. 1965) (Opinions 106a).

The Holding of the Court of Appeals

In affirming, the Court of Appeals held:

A. A Railway Labor Act System Board of Adjustment does not have jurisdiction over a union-security discharge case, since this is primarily a dispute between the employee and his bargaining agent rather than a dispute between the employee and his employer (Opinions 14a);

B. Brady was entitled to obtain reinstatement in this action and the relief of reinstatement is not limited to the administrative procedures established by the Agreement (Opinions 34a);

C. The District Court acted properly in ignoring the decision of the System Board of Adjustment upholding Brady's discharge, despite the absence of any finding by the Court that the System Board had denied Brady a fair hearing or otherwise acted improperly (Opinions 20a); and

D. TWA automatically violated the Railway Labor Act when, pursuant to a lawful collective bargaining agreement and in good faith reliance on union certification, TWA complied with the decision of the System Board and discharged Brady for failure to maintain membership in good standing in the IAM (Opinions 28a-32a).

Reasons for Granting the Writ

I.

This case raises an important question in the administration of Title II of the Railway Labor Act—the extent of the jurisdiction of an airline System Board of Adjustment in union-security disputes, a question which will affect the administration of every collective bargaining agreement in the airline industry containing a union-security clause. The decision below is in direct conflict with the holdings of this Court and the holdings of other circuits involving union-security discharges of railroad employees under Title I of the Act.

In holding that the TWA-IAM System Board had no jurisdiction over Brady's claim for wrongful discharge, the Court of Appeals has cast doubt on the jurisdiction of any System Board to resolve any union-security dispute. Every airline, every airline union and every airline employee has a vital interest in having this doubt resolved.

Section 204 of the Act (45 U. S. C. §184) requires carriers and unions subject to the Act to provide in their collective bargaining agreements for the creation of adjustment boards to resolve disputes not disposed of by grievance procedures. It is unquestioned that these adjustment boards have jurisdiction over wrongful discharge claims. Indeed, the submission of such grievances to an adjustment board "is not a matter of voluntary agreement"; the Act compels the parties to arbitrate such claims before adjustment boards. *Walker* v. *Southern Ry.*, 385 U. S. 196, 198 (1966).

The holding of the Court of Appeals below is contrary to the decisions of this Court and those of other circuits

holding that the National Railroad Adjustment Board established under Section 3 of the Act (45 U. S. C. §153) has exclusive primary jurisdiction to determine the validity of union-security discharges of railroad employees.[9]

In 1954 this Court in a *per curiam* opinion affirmed the holding of a three-judge court sitting in the Northern District of Illinois that a union-security discharge case "is a dispute within the meaning of Section 3, First (*l*), cognizable by the Board, and that the courts are without jurisdiction." *Johns* v. *Baltimore & Ohio R.R.*, 118 F. Supp. 317, 320 (N. D. Ill. 1954), *aff'd. per curiam*, 347 U. S. 964 (1954).

With one possible exception, there is uniform agreement among the circuits that the National Railroad Adjustment Board has exclusive primary jurisdiction in all union-security discharge cases. See, *e.g.*, *Battle* v. *Brotherhood of Ry. and S.S. Clerks*, 320 F. 2d 742 (D. C. Cir. 1963); *Alabaugh* v. *Baltimore & Ohio R.R.*, 222 F. 2d 861 (4th Cir.), *cert. denied*, 350 U. S. 839 (1955); *Pigott* v. *Detroit, T. & I. R.R.*, 221 F. 2d 736 (6th Cir. 1955); *United R.R. Operating Crafts* v. *Pennsylvania R.R.*, 212 F. 2d 938 (7th Cir. 1954); *United R.R. Operating Crafts* v. *Northern Pacific R.R.*, 208 F. 2d 135 (9th Cir. 1953), *cert. denied*, 347 U. S. 929 (1954); *United R.R. Operating Crafts* v. *Wyer*, 115 F. Supp. 359 (S. D. N. Y.), *aff'd.*, 205 F. 2d 153 (2nd Cir. 1953), *cert. denied*, 347 U. S. 929 (1954).

In *Wyer* Judge Conger dismissed an employee's complaint seeking to enjoin a railroad employer from honoring

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[9] The jurisdiction of the National Railroad Adjustment Board under Section 3 of the Act (45 U. S. C. §153) is comparable to the jurisdiction of the TWA-IAM System Board of Adjustment under Section 204 of the Act (45 U. S. C. §184).

a union-security discharge certification on the grounds that the Board's jurisdiction "is exclusive within the rule of the Pitney,[10] Slocum[11] and Southern R. Co.[12] cases". 115 F. Supp. at 365.

The Second Circuit is also in accord in the ordinary union-security discharge cases. In some cases, however, where bias or hostile discrimination on the part of the union was established—as is not the case here—this Circuit has permitted a review on the merits of an adjustment board decision or has denied adjustment board jurisdiction.[13] In *Rychlik* v. *Pennsylvania R.R.*, 229 F. 2d 171 (2nd

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[10] *Order of Ry. Conductors* v. *Pitney*, 326 U. S. 561 (1946).

[11] *Slocum* v. *Delaware, L. & W. R.R.*, 339 U. S. 239 (1950).

[12] *Order of Ry. Conductors* v. *Southern Ry.*, 339 U. S. 255 (1950).

[13] But even in such cases the decisions of the Second Circuit appear to be in conflict. See *Rychlik* v. *Pennsylvania R.R.*, 229 F. 2d 171 (2nd Cir. 1956), *rev'd on other grounds*, 352 U. S. 480 (1957) and *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (2nd Cir. 1959). But *cf. Thompson* v. *New York Cent. R.R.*, 361 F. 2d 137, 143 n. 7 (2nd Cir. 1966), where the Court said:

> "There is no doubt that individual employees, such as the plaintiffs here, whose interests vis-à-vis their employer are hostile to those of their union, have standing to present grievances to the Adjustment Board, irrespective of the union's position. The discussion to the contrary in Steele v. Louisville & Nashville R.R., 1944, 323 U. S. 192, 205-206, 65 S. Ct. 226, 89 L. Ed. 173, is no longer valid. See Elgin, Joliet & Eastern Ry. v. Burley, 1945, 325 U. S. 711, 731-738, 65 S. Ct. 1282, 89 L. Ed. 1886, aff'd on rehearing, 1946, 327 U. S. 661, 66 S. Ct. 721, 90 L. Ed. 928; Conley v. Gibson, 1957, 355 U. S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80. See also Starke v. New York C. & St. L. R.R., 7 Cir., 1950, 180 F. 2d 569, 573; Spires v. Southern Ry., 4 Cir., 1953, 204 F. 2d 453; Colbert v. Brotherhood of R.R. Trainmen, 9 Cir., 1953, 206 F. 2d 9, 12, cert. denied, 1954, 346 U. S. 931, 74 S. Ct. 320; Gainey v. Brotherhood of Railway, etc., Clerks, 3 Cir., 1960, 275 F. 2d 342."

Cir. 1956) the Second Circuit held that a Railroad System Board of Adjustment established pursuant to Section 3, Second of the Act, had jurisdiction over the union-security dispute between Rychlik and the Brotherhood of Railroad Trainmen. However, it further held that this jurisdiction was subject to full review on the merits, because of the bias which must be attributed to a body half of whose members represented the Brotherhood of Railroad Trainmen. Because of conflict between the Second and Sixth Circuits[14] and the importance of these questions in the administration of the Railway Labor Act, this Court granted certiorari. 351 U. S. 930 (1956). But, in its opinion reversing the Second Circuit on other grounds this Court did not reach the question of the extent of the review to be accorded the proceedings before the System Board of Adjustment. 352 U. S. at 489 (1957).[15]

In *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (2nd Cir. 1959), it was held that an adjustment board did not have jurisdiction of a railroad employee's claim that his union-security discharge was the result of "hostile discrimination". However, even in this case the court was careful to point out that

> "... in order to establish a breach by the union of its duty to represent the employees fairly, as the bargain-

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[14] *Pigott* v. *Detroit, T. & I. R.R.*, 221 F. 2d 736 (6th Cir. 1955).

[15] In concurring Mr. Justice Frankfurter said "The determination of the System Board on the merits is not open to judicial review, even on so-called legal questions. It is not for a court to say that a complaint against the System Board must fail because the System Board rightly held against the complainant. Right or wrong, a court has no jurisdiction to review what the System Board did, unless a complainant asserts arbitrariness and seeks to enforce the limited protection established in the *Steele* case." 352 U. S. at 499.

> ing representative of the employees sanctioned by statute, it is not enough to prove that the union was wrong in demanding Cunningham's dismissal. This duty was no more than to forbear 'hostile discrimination.' The arbitrariness must be of the bad faith kind. As Justice Stone suggested in Steele [v. Louisville & Nashville R.R.], 323 U. S. at page 203, 65 S. Ct. 226, it is not violative of federal law that the union not satisfy all employees or that it improperly balance the rights and obligations of the various groups it represents. Something akin to factual malice is necessary. While the union may fail to strike a balance in the most equitable fashion possible it at least must try." 266 F. 2d at 417.

Here, however, the Court of Appeals has rejected the qualification stated in *Cunningham* by denying the jurisdiction of the System Board of Adjustment although there was no finding of hostile discrimination. The holding of the Court of Appeals is, therefore, in conflict with the decisions of six other circuits as well as the decisions of this Court.

If the Court of Appeals is correct here, then every collective bargaining agreement in the airline industry containing a union-security provision—a majority of such agreements—must be rewritten. No employee who claims to have been wrongfully discharged under such a provision can resort to a System Board for prompt determination of his claim but will be required to resort to litigation.[16]

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[16] The burden on the employee, the union and the employer of such a requirement is obvious from this case, involving a dispute over a discharge in May 1956, and from *Cunningham*, in which the Second Circuit finally decided in March 1966 a dispute over a discharge in February 1955. *Cunningham* v. *Erie R.R.*, 358 F. 2d

Moreover, the Court of Appeals in holding the System Board without jurisdiction over a union-security discharge has considered only the circumstance in which the carrier has complied with the union's discharge certification. It has failed to consider the other side of the coin, the circumstance in which the carrier refuses to comply. What forum has jurisdiction to determine that controversy?

Is such a controversy properly before a System Board because it is a dispute between the employer and the union? If so, this would enable the employer to determine that the System Board has jurisdiction in every case simply by initially rejecting the union certification.

Or, does the System Board entirely lack jurisdiction of such a dispute? If this is the case the union may claim it is free to strike to enforce the union-security provisions of the collective bargaining agreement since the dispute is outside the administrative procedures of the Act.

It is respectfully submitted that the confusion which must result from this decision will inevitably disturb orderly labor-management relations in the airline industry and disrupt interstate commerce thereby frustrating the primary purpose of Section 2 of the Act (45 U. S. C. §151a) to "avoid any interruption to commerce or the operation of any carrier engaged therein". No purpose of the Railway Labor Act is served by denying System Boards jurisdiction over union-security discharges. The important questions which this decision has raised but not resolved should be settled by this Court.

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640 (2nd Cir. 1966). In contrast, System Board hearings under Title II of the Act are held promptly and there is no backlog of cases. Brady's System Board hearing took place within two weeks of the union discharge certification.

II.

This case also raises another important question of federal law which the Court of Appeals has decided in conflict with applicable decisions of this Court. The Court of Appeals has affirmed the jurisdiction of the District Court to order Brady's reinstatement. But federal substantive law provides that a discharged airline employee may seek reinstatement only by processing his grievance through a System Board of Adjustment. If he sues for unlawful discharge the employee is limited to an award of money damages only.

In an unbroken line of cases commencing in 1941 and continuing through its most recent decision of December 5, 1966, this Court has repeatedly held that an employee subject to the Railway Labor Act has two remedies when he claims an unlawful discharge. He may seek reinstatement and back pay by appealing his discharge to the applicable Adjustment Board. Or, *if he decides to treat his contract of employment as at an end,* he may sue, where permitted by State law, for money damages based on unlawful discharge. *Moore* v. *Illinois Central R.R.*, 312 U. S. 630 (1941); *Slocum* v. *Delaware, L. & W. R.R.*, 339 U. S. 239, 244 (1950); *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653 (1953); *Walker* v. *Southern Ry.*, 385 U. S. 196 (1966).[17]

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[17] In allowing such State court actions for money damages this Court has held that the appropriate Adjustment Board continues to have exclusive jurisdiction over the interpretation of collective bargaining agreements under the Act stating:

> "A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling

In *Walker,* this Court outlined the available remedies as follows:

> " . . . a discharged railroad employee aggrieved by the discharge may either (1) pursue his remedy under the administrative procedures established by an applicable collective bargaining agreement subject to the Railway Labor Act, and his right of review before the National Railway Adjustment Board, or (2) if he accepts his discharge as final, he may bring an action at law in an appropriate State court for money damages if the State courts recognize such a claim." 385 U. S. at 196.

Under each of these prior decisions of this Court, an appeal to the System Board of Adjustment was the exclusive means by which Brady could have obtained reinstatement.

> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for

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such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board." *Slocum* v. *Delaware, L. & W. R.R. Co.,* 339 U. S. 239, 244 (1950).

Whether, since *IAM* v. *Central Airlines, Inc.,* 372 U. S. 682 (1963) this Court will continue to permit such State court actions for money damages to be maintained would appear an open question. Mr. Justice Harlan, joined by Justices Stewart and White in dissenting in *Walker* v. *Southern Ry.,* 385 U. S. 196, 199 (1966), suggests that since federal substantive law now controls the employee-employer relationship under the Act such State court actions should no longer be permitted.

> orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, 103." *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 653 (1965).

The present decision is without judicial precedent. In no case since Title II of the Railway Labor Act was adopted in 1936 has an airline employee secured reinstatement by ignoring the administrative procedures of his collective bargaining agreement and instead suing for wrongful discharge in the courts. This is not an appropriate case to make an exception to the federal labor policy enunciated by Congress in the Railway Labor Act and sustained in an unbroken line of decisions of this Court.

III.

This case raises a third important question of federal law which has not been, but should be, settled by this Court—the question of whether an employer "automatically" violates the Act when in good faith reliance on union certification it complies with a System Board decision upholding the discharge of an employee for failure to maintain membership in good standing in his union, if a court later determines that *without the employer's knowledge* the union had improperly certified the employee's discharge.

There is no provision for "automatic" liability under the Act. Nor does the legislative history of Section 2, Eleventh, providing for union-security agreements, indi-

cate that Congress intended railroad and airline employers to be "automatically" liable for union dereliction under the Railway Labor Act, while absolving all other employers from such liability under Section 8(a)(3) of the Labor Management Relations Act.[18] In fact, that legislative history makes it clear that the union-security provisions of the two Acts are substantially the same. In its report when Section 2, Eleventh was added to the Railway Labor Act in 1951, the Senate Committee stated that the terms of Section 2, Eleventh "are substantially the same as those of the Labor-Management Relations Act as they have been administered. . . ." (1950 U. S. Code Cong. Serv. 4321).

Federal substantive law is here applicable. *IAM* v. *Central Airlines, Inc.*, 372 U. S. 682, 691 (1963). And this Court has made it clear that the liability of the employer for damages in cases such as this rests on an entirely different basis from that of the union. *Vaca* v. *Sipes*, 386 U. S. 171 (1967). As stated by Mr. Justice Goldberg, concurring in *Humphrey* v. *Moore*, 375 U. S. 335, 356 (1964), "the [employee's] remedy in a suit based upon a breach of the union's duty of fair representation" may be enforced against the employer only "under appropriate

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[18] 61 Stat. 140, as amended by 73 Stat. 525, 29 U. S. C. §158(a)(3). It is only where the employer "has reasonable grounds for believing that [union] membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" that an employer is liable for union dereliction in LMRA cases. *NLRB* v. *Leece-Neville Co.*, 330 F. 2d 242 (6th Cir.), *cert. denied*, 379 U. S. 819 (1964); *Producers Transport, Inc.* v. *NLRB*, 284 F. 2d 438, 443 (7th Cir. 1960); *NLRB* v. *Pape Broadcasting Co.*, 217 F. 2d 197 (5th Cir. 1954); *Krambo Food Stores, Inc.*, 114 N. L. R. B. 241, 244 (1955), *aff'd sub nom. NLRB* v. *Allied Independent Union*, 238 F. 2d 120 (7th Cir. 1956).

circumstances" such as where "the employer willfully participated in the union's breach of its duty of fair representation".

The decision below is in direct conflict with the legislative history of the Railway Labor Act and represents a significant departure from the approach of this Court in employee-union-employer litigation. A prompt and authoritative answer is necessary in view of the fundamental character of this question under the Act.

CONCLUSION

For the reasons stated, the writ should be granted.

Respectfully submitted,

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Of Counsel

Dated: November 4, 1968

Certificate of Service

I, HAROLD L. WARNER, JR., hereby certify that:

1. I am a member of the Bar of this Court.

2. I have this day served the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit by depositing true copies thereof in a Letter Box maintained and exclusively controlled by the United States at 25 Broadway, New York, New York 10004, with first class postage prepaid, addressed to the following counsel of record in this action at the addresses designated by them, as follows:

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HAROLD L. WARNER, JR.

November 4, 1968

APPENDIX A

Judgment Sought to Be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,267

VINCENT P. BRADY,

vs.

TRANS WORLD AIRLINES, INC., a corporation of the State of Delaware,

and

THE INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association,

TRANS WORLD AIRLINES, INC.,

Appellant.

(D. C. Civil Action No. 1884)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ——— DISTRICT OF DELAWARE

Present:

HASTIE, *Chief Judge*, and
McLAUGHLIN and FORMAN, *Circuit Judges*.

APPENDICES

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Present:

HASTIE, *Chief Judge,* and
McLAUGHLIN and FORMAN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the —— District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 6, 1966, be, and the same is hereby affirmed. Each of the parties to this appeal will bear his own costs.

ATTEST:

THOMAS F. QUINN
Clerk

August 13, 1968

APPENDIX B

Statutes Involved

The following is the text of Sections 2, First, Fourth, Fifth and Eleventh, 3, 201 and 204 of the Railway Labor Act (49 U.S.C. §§ 151a, 152, First, Fourth, Fifth and Eleventh, 153, 181 and 184):

SEC. 2. [*44 Stat. 577, as amended by 48 Stat. 1186, 62 Stat. 909, 64 Stat. 1238, 45 U.S.C. 151a, 152*] The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretations or application of agreements covering rates of pay, rules, or working conditions.

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

• • • • •

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify

the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

• • • • •

Eleventh. [*45 U. S. C. § 152 as added by Act of January 10, 1951, 64 Stat. 1238*] Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of

any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his

employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended.

SEC. 3. [*44 Stat. 578, as amended by 48 Stat. 1189, 80 Stat. 208, 45 U.S.C. 153*] First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the divi-

sion on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of

Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signalmen, sleeping-car conductors, sleeping-car porters, and maids and dining car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions.

This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote

of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement

for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the decision of the Adjustment Board: *Provided, however,* That such order may not be set aside ex-

cept for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice chairmanship of any division shall alternate as

between the groups, so that both the chairmanship and vice chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjust-

ment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board

shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute

or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

SEC. 201. [*Added by 49 Stat. 1189, 45 U. S. C. 181*] All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

SEC. 204. [*Added by 49 Stat. 1189, 45 U. S. C. 184*] The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

Supreme Court of the United States

OCTOBER TERM, 1962

No. 735

VINCENT J. BRADY,

Cross-Petitioner,

against

TRANS WORLD AIRLINES, INC.,

Respondent,

and

THE INTERNATIONAL ASSOCIATION OF MACHINISTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Supreme Court Press, Inc., Phila., Pa., 1962—Sup. Ct. Nos. 6442 and 6443

INDEX TO PETITION.

	Page
Introduction	1
Summary of Prior Decisions	2
Jurisdiction of the United States Supreme Court	4
Question Presented	4
Statutes Involved	5
Federal Jurisdiction	6
Statement of Case	7
Argument	21

CASES CITED.

Page

Brady v. TWA and IAM, 156 F. Supp. 82 (1957) 2
Brady v. TWA and IAM, 167 F. Supp. 469 (1958) 2
Brady v. TWA and IAM, 174 F. Supp. 360 (1959) 2
Brady v. TWA and IAM, 196 F. Supp. 504 (1961) 2
Brady v. TWA and IAM, 223 F. Supp. 361 (1963) 3, 8, 23
Brady v. TWA and IAM, 244 F. Supp. 820 (1965) 3
Brady v. TWA and IAM, — F. 2d — (3rd Cir. 1968) 3, 8
Brotherhood of Railroad Trainmen v. Howard, 1952, 343 U. S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283 25
Conley v. Gibson, 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 25
Cunningham v. Erie R. Co., 358 F. 2d 640, 645 (2nd Cir. 1966) 21, 23
Detroy v. American Guild of Variety Artists, 286 F. 2d 75 (2 Cir.), cert. denied, 336 U. S. 929 (1961), 69 S. Ct. 643, 93 L. Ed. 1090 27
Foy v. Norfolk & W. Ry., 377 F. 2d 243 (4th Cir. 1967) 27
Gainey v. Brotherhood of Railway & Steamship Clerks, 275 F. 2d 342 (3rd Cir.), cert. denied, 363 U. S. 811 (1960, 80 S. Ct. 1246, 4 L. Ed. 2d 1152, and 313 F. 2d 318 (3 Cir. 1963) 27
Hurn v. Oursler, 289 U. S. 238 (1933), 53 S. Ct. 586, 77 L. Ed. 1148 25
International Association of Machinists v. Gonzales, 356 U. S. 617 (1957) 27
Neal v. Systems Board of Adjustment, 348 F. 2d 722 (8 Cir. 1965) 27
Nobile v. W. B. Woodward, 200 F. Supp. 785 (Ed. Pa. 1962) 25
Richardson v. Texas and New Orleans RR., 242 F. 230 (5th Cir. 1957) 21, 25
Steele v. Louisville & Nashville R. R., 1944, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173 25
United Construction Workers v. Laburnum, 347 U. S. 656 (1954), 74 S. Ct. 833, 98 L. Ed. 1025 27

STATUTES CITED.

	Page
Railway Labor Act, 45 USCA § 152 (Eleventh) (Fourth)	1, 3, 5, 6
Bill of Rights of the Members of Labor Organizations, 29 USCA § 411(a)(4)	27
Courts of Appeals; Certiorari; Appeals; Certified Questions, 28 USCA § 1254(1)	7

INTRODUCTION.

Your Cross-Petitioner is Vincent P. Brady (Brady), an individual and resident of Wilmington, Delaware, who submits this Cross-Petition for Writ of Certiorari to request a jury trial to prove common law damages.

Brady was caused by the International Association of Machinists (IAM) and Trans World Airlines, Inc. (TWA) to be unlawfully discharged from his employment as an airline mechanic with TWA at International Airport, Philadelphia, Pennsylvania, on May 8, 1956. Since then through twelve years of litigation, Brady has sought from the IAM and TWA reinstatement to his employment and membership in the IAM, lost wages, and common law damages suffered by him and his wife and caused by reason of the unlawful discharge.

The United States District Court for the District of Delaware and the United States Court of Appeals for the Third Circuit agreed that Brady had been unlawfully discharged in violation of the Railway Labor Act 45 USCA § 152 (Fourth) and (Eleventh).

However, neither court would agree (for different reasons) that Brady was entitled to prove before a jury his claim for common law damages resulting from the unlawful discharge.

After these twelve years of litigation, Brady, who is now 47 years old, finally has been granted reinstatement and $10,617.80 in lost wages for the period 1956-1966.

However, Brady has not been granted one penny for the suffering and legal expenses (which consumed his life savings) to which he has been subjected to secure that which should have been granted to him by the IAM and TWA twelve years ago (namely, reinstatement to this employment and to membership in the union) if the IAM had performed its statutory duty as bargaining agent to repre-

sent him fairly and in good faith, and if TWA had acted independently and not as a tool of the union.

Brady's case cries out for justice and consideration. Otherwise the very legislation designed to protect Brady's rights as an individual and as an employee will be used to destroy him. When the union and employer join in an unholy alliance against an individual employee, what chance does he have if the courts turn their back to him. Justice demands that Brady be given the right to a jury trial to prove the damages he and his wife have suffered.

SUMMARY OF PRIOR DECISIONS.

The official reports of the United States District Court for the District of Delaware, as well as the decision of the United States Court of Appeals for the Third Circuit, are as follows:

1. 156 F. Supp. 82 (1957)—hearing on the Motions of the IAM and TWA to Dismiss the Complaint for lack of jurisdiction.

2. 167 F. Supp. 469 (1958)—reargument on Federal jurisdiction and the Motions of the IAM and TWA for Summary Judgment.

3. 174 F. Supp. 360 (1959)—hearing on whether or not Brady's second amended Complaint states a cause of action.

4. 196 F. Supp. 504 (1961)—hearing on cross-motions for summary judgment and the motions of the IAM and TWA to strike Brady's demand for a jury trial.

5. 223 F. Supp. 361 (1963)—hearing on the question of liability.

6. 244 F. Supp. 820 (1965)—hearing on the damages that Brady could obtain.

The final order and judgment of the District Court and its accompanying opinion, entered September 6, 1966, are unreported. The judgment and the above listed opinions are set forth in full in the Petition for Certiorari filed by the IAM and TWA.

The final judgment of the United States District Court, per Wright, Chief Judge, held the IAM and TWA jointly liable for unlawfully causing Brady to be discharged from his employment in violation of the Railway Labor Act, 45 U. S. C. A. § 152, Eleventh (A) and § 152 Fourth, and ordered that Brady be reinstated to his employment with TWA and membership in good standing with the IAM, with restoration of all benefits. Damages in the amount of $10,617.80, representing lost wages for the period 1956-1966, were also awarded.

The IAM and TWA appealed the decision of the District Court, and Brady filed a cross-appeal requesting review of that portion of the decision which denied Brady trial by jury and the opportunity to prove and recover common law damages, including punitive damages, suffered by reason of hostile discrimination resulting in the unlawful discharge.

The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court by denying the appeals of the IAM and TWA and the cross-appeal of Brady. A copy of the decision of the Court of Appeals for the Third Circuit and the Order filed August 13, 1968, are set forth in the IAM's Petition for Certiorari.

JURISDICTION OF THE UNITED STATES SUPREME COURT.

Brady seeks by this Cross-Petition review of that part of the judgment of the United States Court of Appeals for the Third Circuit, entered August 13, 1968, which denied him trial by jury to prove common law damages.

Brady's Cross-Petition for review is submitted under the authority of Title 28 USCA § 1254(1), which provides for discretionary review by the United States Supreme Court of decisions of the United States Court of Appeals by Writ of Certiorari.

QUESTION PRESENTED.

Must Brady, a former employee of TWA and member of the IAM, who was unlawfully discharged from that employment in violation of the Railway Labor Act because of alleged and proven hostile and bad faith discrimination practiced upon him by the IAM and TWA exhaust internal union appellate remedies which were never made available to him by the IAM before he has a right to a jury trial in a Federal Court with Federal Question Jurisdiction to recover from the IAM and TWA common law damages which directly resulted from the unlawful discharge.

STATUTES INVOLVED.

The statutes involved are § 2 (Fourth) and § 2 (Eleventh) of the Railway Labor Act (45 USCA § 152 (Fourth) and § 152 (Eleventh)). These statutory provisions are set forth in full below:

> "*Fourth.* Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free

transportion to its employees while engaged in the business of a labor organization."

"*Eleventh.* Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) To make agreements, requiring, as conditions of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

FEDERAL JURISDICTION.

Federal question jurisdiction exists under and by virtue of the alleged and proven hostile discrimination practiced against Brady by the IAM and TWA resulting in his discharge in violation of the Railway Labor Act, 45 USCA § 152 (Fourth) and § 152 (Eleventh).

STATEMENT OF CASE.

Vincent P. Brady is a resident of Wilmington, Delaware, is married, has one child, and is 47 years old.

He was employed by TWA from 1951 through his discharge on May 8, 1956. He was a line mechanic, a member of local lodge 1776 of the IAM, and a shop steward. He is presently employed by Boeing Vertol.

The IAM branded Brady as a trouble maker and, through bad faith discriminatory practices, effectively caused his discharge from his employment with TWA while he was a member in good standing with the union and TWA, and then justified the discharge action before the Airline Systems Board of Adjustment by intentionally misrepresenting certain essential facts that would have established Brady's good standing with the IAM and his right to his job with TWA.

The IAM asserted that Brady was discharged because he failed to pay dues and thus maintain membership in the Union in good standing, citing the Union Security Provision of the TWA-IAM Labor Agreement, Article XXVI, Section (A), and the automatic cancellation provision of Article E, Sec. 14 of the IAM Constitution. Both the United States District Court and United States Court of Appeals disagreed.

Article XXVI(a) of the TWA-IAM Labor Agreement provided as follows:

> "(A) Each employee now or hereafter employed in any work covered by this Agreement shall, as a condition of continued employment in such work, within sixty (60) days following the beginning of such employment or the effective date of this Article, whichever is later, become a member of, and thereafter maintain membership in good standing (As herein defined), in the Union, except as provided otherwise herein. Such condition shall not apply with respect to any employee to whom

such membership is not available upon the same terms and conditions as are generally applicable to any other member of his classification (and at his point on the Company's system), or with respect to any employee to tender the dues uniformly required of other members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership.

"For the purpose of this Article, '*membership in good standing in the Union' shall consist of the payment by the employee of dues for each calendar month, no later than the last day of the following calendar month,* which are uniformly required of members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership." (Emphasis added.)

The automatic cancellation provision of the IAM constitution, Article E., Sec. 14, provided as follows:

"Sec. 14. Delinquency for 3 months in the payment of dues or assessments shall automatically cancel membership and all rights, privileges and benefits incident thereto. The period of good standing membership of members whose membership has been cancelled for delinquency, or other cause shall date from their last reinstatement, as shown by the G. L. records, and their rights, privileges and benefits under the provisions of this Constitution shall attach and date from their last reinstatement, as though they had never before held membership in the IAM."

Brady, when discharged, was only two months in arrears in paying dues—and the lower courts so held.[1]

1. *Brady v. TWA and IAM,* 223 F. Supp. 361 (1963); *Brady v. TWA and IAM,* — F. 2d — (3rd Cir. 1968).

Brady had paid dues through November, 1955 and, in response to a demand from Clifford Miller, General Chairman, District 142, IAM, that dues be paid by March 28, 1956 (Exhibit P-3), he tendered a check for $10.50 (Exhibit P-5), together with his dues book, to Gerald C. Coleman, Financial Secretary of Local 1776 of the IAM, on March 27, 1956. This was four days before a three month delinquency would occur.[2]

The IAM dues rate at the time Brady tendered his check for $10.50, according to the IAM, was $3.25 per month for Brady's classification and his March 27, 1956 tender of $10.50 was more than sufficient, under Article XXVI (a), to cover dues through February, 1956.[3] Therefore, Brady, by his March 27, 1956 tender had maintained his membership in the IAM in good standing.

However, the IAM rejected Brady's March 28, 1956 tender of $10.50 and instead demanded $34.75 (Exhibit P-4), representing dues for three months ($9.75), which Brady had already tendered, and a reinstatement fee ($25.00).[4] Thus, the IAM although first demanding that dues alone be paid by March 28, 1956, and receiving more than sufficient monies to cover the dues arrearage by that date, arbitrarily rejected Brady's dues payment and demanded the same amount of dues that had been paid, plus a $25.00 reinstatement fee. The IAM justified its reversal on the theory that Brady, on March 1, 1956, was three months in arrears (December, January, and February) and was

2. Under Article XXVI(a) of the TWA-IAM agreement, December 1955 dues were payable by January 31, 1956, January 1956 dues by February 28, and February dues by March 31, 1956.

3. According to Brady the dues of Local 1776 had been raised from $3.00 to $3.50 per month for all classifications (Exhibit P-63), which was why Brady tendered $10.50.

4. The reinstatement fee for Local 1776 was $20.00, not $25.00. Therefore, Brady was charged an excessive reinstatement fee as well as excessive dues.

subject to automatic cancellation under Article E, Sec. 14 of the IAM Constitution.

The lower courts found that Brady was in fact only two months behind in paying dues when he was cited for discharge and that he was therefore not subject to the automatic cancellation provision of the IAM Constitution. Accordingly, his discharge was for reasons other than nonpayment of dues, and was in violation of the Railway Labor Act, 2 (Eleventh), and 2 (Fourth).

Neither the District Court nor the Court of Appeals ruled on Brady's claim that he was discriminated against by the IAM and TWA.

The District Court felt it did not have to because Brady's recovery was limited to reinstatement and lost wages whether the violation involved 2(4), 2(11) or hostile discrimination.[5]

The Court of Appeals ruled that Brady did not exhaust internal union remedies; therefore, he did not qualify to make a claim for common law damages which conceivably would otherwise be available on the hostile discrimination claim.[6]

Brady submits that he was discriminated against by the IAM, that same was in bad faith, that TWA participated in this discrimination, and, because of the existence of hostile discrimination causing his discharge from TWA, Brady does not have to exhaust internal union remedies as a condition precedent to making a claim for common law damages in the Federal Court—especially where the internal union remedies were never made available to him.

The following review of the circumstances which occurred prior and subsequent to his discharge establishes

5. *Brady v. TWA and IAM,* 196 F. Supp. 504 (1961); *Brady v. TWA and IAM,* 223 F. Supp. 361 (1963).

6. *Brady v. TWA and IAM,* — F. 2d — (1968).

that Brady was subjected to discrimination by the IAM (in which TWA acquiesced) which was intentional, malicious and in bad faith.

The discrimination was precipitated by a dispute that existed between Brady and the IAM over Union procedure in raising the monthly dues payable by members in Local 1776.

In October of 1955, the IAM instituted a movement to raise dues of its membership in Local 1776 from $3.00 per month to $3.25 per month. This movement culminated at a meeting of the membership held November 2, 1955 when, after three separate votes, the Union was successful in obtaining a bare majority to push through a dues increase of 50¢ for all classifications. The successful vote was 14 to 12 (Exhibit P-24 and 25).

Many members of the Union were disappointed with the vote, not because of the amount of the increase nor the fact that the dues were raised, but because they did not receive sufficient notice of the time and place of the meeting. Consequently, many members of the Union did not have the opportunity to vote (N. T. 22-31).

These disgruntled employees approached Brady, who at that time was a shop steward, and asked for his assistance, which he agreed to give them. At the next meeting of the membership held in December of 1955, Brady and others challenged the legality of the dues increase. The IAM attempted to table Brady's protest and the IAM was rejected by a vote of 7 to 3 (Exhibit P-26).

Brady then moved that the dues increase be rescinded and that it be brought before the next general membership meeting and voted upon after posting due notice of the intent and purpose of the meeting. The IAM refused to consider Brady's motion which had been seconded, and Brady challenged the chair. The membership then voted 14 to 3 to accept B ady's challenge and motion (Exhibit P-26).

The IAM did not post notices as demanded by the vote of the membership, nor did they hold a general membership meeting during the following month of January (N. T. 26). The only meeting held was a special meeting, called by the Union, but no mention was made of the motions made by Brady or the dues question (N. T. 26, 27).

Brady, on February 9, 1956, took it upon himself to protest the action of the Local by writing to A. J. Hayes, International President, E. Peterson, another officer of the International, and also other local lodges in the area (Exhibit P-63).

The answer that Brady received from the International sent by Hayes and by Peterson did not satisfy him, and from that day on, until March 27, 1956, Brady refused to tender dues at the new rate to protest the procedure used by the Union in raising the dues.

Brady, however, on numerous occasions, did tender dues at the old $3.00 rate, which tenders were always refused by the Financial Secretary, Gerald C. Coleman (N. T. 233, 234).

On February 15, 1956, approximately one week after Brady wrote his letter to the International President of the IAM, to object to the procedures used by the IAM in raising dues, Coleman, the financial secretary of the Local, posted Brady's name with others as being two or more months behind in dues, and gave them 10 days to pay or be subject to discharge (Exhibit P-6). Brady, at that time, was only one month in arrears.

Brady refused to pay dues at the new rate, although he did tender dues at the $3.00 rate, within the ten-day period prescribed, and, on March 3, 1956, Coleman cited his name to the Assistant General Chairman of District 142, of which Local Lodge 1776 was a part, for discharge action (Exhibit P-9).

Brady was the only employee from this Local ever cited for discharge by Coleman (N. T. 227, 228). In fact, Coleman permitted members to get five months behind, and in one case seven months (N. T. 223), without taking any action against them. Even after Brady was cited, Coleman permitted other employees to get three and five months behind in the payment of dues, and never cited these employees for discharge (N. T. 207-219).[7]

The IAM, upon receipt of Coleman's March 3, 1956 citation, sent Brady on March 13, 1956, a demand notice to pay four months' dues on or before March 28, 1956, or be discharged from his employment (Exhibit P-3). It was in response to this letter that Brady, on March 27, 1956, capitulated in his opposition to the dues increase and tendered his check for $10.50, and his dues book, to Coleman, which was more than sufficient to maintain his membership in good standing (N. T. 41-42, 242).

It was then that Coleman, for the first time, on instructions from Miller, demanded payment of a reinstatement fee

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7. CHART SUMMARIZING EMPLOYEES' DUES DELINQUENCIES

Date Paid	*Name*	*Notes of Testimony* Page*	*Months Delinquent*	*Months Not Paid*
2/20/56	Barbehan	207	4	
1/20/56	Applegate	209	4	
8/31/56	Brown	210	4	
6/31/56	Connelly	210-211	4	2
8/31/56	Fimple	211	7	5
2/20/56	McClosky	211	4	1
1/20/56	Wozniak	212	4	1
4/ 7/56	Wozniak	212	3	
12/31/56	Wozniak	212	9	2
6/31/56	DeBacco	213	5	2
8/31/56	Johnson	213	7	2
6/31/56	Malloy	213	5	2

* Hearing held August 27, 1962.

as well as dues. Coleman wrote to Brady, returning his check for $10.50 as well as his dues book, informing him that his tender did not cover *dues and a reinstatement fee.* Coleman's letter demanded three months' dues, which Brady had already paid plus a reinstatement fee of $25.00 by April 4, 1956—thus Brady's union membership had been cancelled, even though a proper tender had been made, and he was given but seven days to pay *or be discharged* (Exhibit P-4).

Brady absolutely refused to tender a reinstatement fee, and justifiably so, as, under the IAM Constitution, he would lose the ten years seniority that he had accumulated with TWA as an aircraft mechanic.[8]

Brady, because of his tender, did not feel that he was delinquent in dues, and appealed in person both to representatives of the IAM and TWA. He sent a telegram to Miller and TWA asking for assistance in interpreting the union security provisions of the Labor Agreement, but received no help (N. T. 47). In fact, even though Brady was asking for help, Miller caused his discharge on April 5, 1956.

On April 3, 1956, one day before the April 4, 1956 deadline, Brady, fearing loss of his job, and justifiably so, filed his first appeal to the TWA-IAM Systems Board of Adjustment.[9]

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8. "Sec. 14. Delinquency for 3 months in the payment of dues or assessments shall automatically cancel membership and all rights, privileges and benefits incident thereto. The period of good standing membership of members whose membership has been cancelled for delinquency, or other cause shall date from their last reinstatement, as shown by the G. L. records, and their rights, privileges and benefits under the provisions of this Constitution shall attach and date from their last reinstatement, as though they had never before held membership in the I. A. M."

9. Brady's April 3, 1956, appeal to the Systems Board is missing from the record submitted to this Court. It is set forth below.

"Dear Sirs and Brothers:

I am in receipt of a registered letter dated March 28th, from Gerald C. Coleman, Financial Secretary of Lodge #1776.

Miller, upon learning of Brady's first appeal, began to assemble the evidence he would need to support his discharge action against Brady and asked Coleman to give him a written summary of his contact with Brady. Miller, after reviewing the information sent to him by Coleman (Exhibit P-11), realized that he would not be able to justify his discharge action because Brady had been asked to pay dues and a reinstatement fee. Miller knew that if he accepted dues, Brady would be a member in good standing under Article XXVI E, Sec. 14 of the IAM constitution.

Miller then cancelled his first discharge action and wrote Brady on April 11, 1956, to demand that a reinstatement fee be paid by April 26, 1956, or he would be discharged (Exhibit P-14).

Brady wrote to Miller on April 18, 1956, to request that he be permitted to pay dues rather than reinstatement fee, but Miller refused (Exhibit P-19). It was then that Brady filed his second appeal to the Systems Board of Adjustment in an effort to save his job (Exhibit D-3). He knew if he

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I have also received a registered letter dated March 13th, from Cliff Miller, General Chairman, District 142. Both letters are related to the same subject, payment of dues and the union security clause of the contract.

This is to inform you that on numerous occasions I have tried to pay my union dues to the financial Secretary but he refused to accept them. I believe I have fulfilled my obligation under the contract, therefore, I appeal the decision to have me discharged, to the Systems Board of Adjustment, providing that such an appeal does not jeopardize my right to appeal outside the Systems Board of Adjustment should I see fit to carry the action further.

Enclosed find a copy of letter wrote by me and dated February 9th, 1956 explaining events about the dues issue.

Should you need any further information or material I should be glad to present it to the Board.

Fraternally yours,
Vincent P. Brady"

did not appeal, the discharge action would be final and he would forfeit his job under the TWA-IAM Labor Agreement, Article XXVI (f).[10]

Brady's second appeal was rejected by the Systems Board of Adjustment because it was premature (Exhibit P-69). Thereafter, he submitted a third appeal.

In all his appeals he informed the Systems Board that he had paid his dues and was a member in good standing. However, the Board ruled against him as a result of the testimony introduced by Miller at the May 4 and May 14th hearings which Brady did not attend because they were in Kansas City, Missouri.

A review of the transcript of these hearings establishes that essential facts as presented by Miller, who was bound by law to represent Brady fairly, were grossly misrepresented to secure Brady's discharge (Exhibits P-1 and P-2).

For instance, Miller misrepresented to the Board that Brady on March 27, 1956, had tendered three months' dues at the rate of $3.00 per month, which was the old rate, whereas Brady had tendered $10.50, more than enough to cover dues at the new rate. Miller had been informed by Coleman that Brady had tendered dues (Exhibit P-11), and also the amount of the tender (N. T. 257).

Miller told the Systems Board that Brady had been informed prior to March 27, 1956, that he owed a reinstatement fee, whereas Brady had been told that payment of dues would be sufficient (Exhibit P-3) (N. T. 51).

Miller told the Systems Board that he had instructed Coleman to give Brady until April 4, 1956, to pay dues, whereas Coleman immediately after talking to Miller wrote

10. "(f) . . . In the event no protest [of discharge action] is filed within the above time limits [three days] the action will be considered as proper and will be final and binding upon all parties concerned."

two letters to Brady demanding both dues and a reinstatement fee (Exhibit P-4). In fact Coleman's letter said the IAM was rejecting the dues tendered by Brady on March 27, 1956, because it did not include a reinstatement fee.

Lastly, when Miller read Coleman's March 28, 1956, letter to the Systems Board, the copy used did not contain the amount that Brady had tendered—$10.50, the most destructive evidence against discharge Miller had to face, as it would have established Brady was in good standing with the Union.[11]

When C. F. Woodling, Labor Relations Representative of TWA, questioned Miller about the provisions of the Union Security clause, Article XXVI(a), namely that dues for one month were not required until the end of the following month, Miller referred to the automatic cancellation provision of the IAM constitution, Article E, Sec. 14, arguing that Article XXVI(a) did not apply, as Brady failed to pay his dues by March 28, 1956, and became subject to automatic cancellation under the IAM Constitution; therefore, was subject to discharge (Exhibit P-1).

Thus Miller, to obtain Brady's discharge, led the Board to believe that Brady had never paid the dues required under Article XXVI(a). With this testimony before them, the Systems Board affirmed Brady's discharge.

Brady, when notified that the Systems Board confirmed his discharge, had his counsel write to the IAM and TWA on June 7, 1956, explaining that Brady had paid dues, and request reinstatement (Exhibit P-76). Brady's request was refused.[12]

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11. Compare the letter Coleman sent to Brady, dated March 28, 1956 (Exhibit P-4), with the letter Miller quoted to the Systems Board (Exhibit P-13).

12. Brady had sent a telegram to Miller on May 17, 1956, "Have compiied with contract. Provisions for appeal. Do I have any recourse under the Constitution before civil action." Miller answered on May 18, 1956, that Systems Board decision was final.

Brady then secured the notes of testimony of the two hearings from the Systems Board, and, for the first time, learned of the discrimination practiced against him by the IAM. He immediately wrote to D. W. Harris, V. P. Industrial Relations, TWA, to point out the misstatements made by Miller (Exhibit P-68), but TWA replied that the SBA decision was final. Exhibit P-68 is missing from the court records; therefore, it is set forth in full below.[13]

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13. October 18, 1956, letter

"To: D. W. Harris
Vice President
Industrial Relations

Dear Sir:

I am writing to you concerning the matter of my discharge from T. W. A. under the union security provision of the contract.

Your letter of May 1st informed me that I was to be discharged at the close of work May 8, 1956. I appealed to the system board of adjustment on receipt of your notice. The board met & upheld the decision for discharge & notified me of that decision. It was, Mr. O. L. Koontz, Vice chairman & union member of the board who notified me that I was discharged & not yourself or any other T. W. A. officer who has the sole authority to do the discharge. My forman has informed that he didn't discharge me but a union member Mr. O. L. Koontz did. Is this proper procedure under law & contract? If it is not, I would like to be reinstated with all back pay & privileges that were mine before & since discharge including the overtime lost.

I would also like to bring to your attention a few discrepancies noticed reading thru the record of my hearings. I would like to bring them to the members of the board for reconsideration.

First, In my appeal I asked that all correspondence between affected parties be introduced on my behalf. Reading thru the record I see no mention of my Feb 9th letter to A. J. Hayes & a few lodges. I consider it very important that the members read that letter & that it be made a part of the record of the hearings.

Second, I asked that the minutes of Lodge 1776 be presented at the hearing. I understand they weren't available. The recording secretary claims he mailed carbon copies of them to the District. Why weren't they introduced on my behalf?

Third, I received my first notice from the district dated March 13, 1956 and I quote in Part, 'This letter is to inform you that you must become a good standing member, including payment of dues for the month of March 1956, in the union before midnight, March 28, 1956 or you will be discharged within the week following March 28, 1956.

Prior to March 28th, 1956 I sent my registered mail a check for $10.50. It was to cover three months dues at $3.50 a month. Actually it should have been $9.75 @ 3.25 a month for mechanics. I was under the impression it was a 50¢ raise for all classifications. Instead it's 50¢ for classifications below mechanics & 25¢ for mechanics. Mr. Gerald C. Coleman financial secretary of lodge 1776 received & acknowledged receipt of my check in the allotted time. Enclosed find a carbon copy Mr. Coleman sent me on March 28th.

Take the record of system boards hearing for May 14th, 1956 & turn to page 9 Reading the second paragraph & I quote, 'Just prior to midnight on March 28th, the established deadline for, Mr. Brady, making payment of his union dues, the financial secretary of Lodge 1776 received a check from Mr. Brady making payment of three months due at the rate of $3.00 a month rather than at the rate of $3.25." Unquote'

That sir is *not true* as the record shows & I can prove. I did pay my dues at the new increase rate before March 28th the deadline.

Reading all of page 9 and page 10 & 11 of May 14, 1956 notes of testimony Mr. Miller did not present to the system board the full contents of Mr. Colemans letter to me. I quote the missing part 'I have taken this action as a result of instructions from Mr. Cliff Miller, District 142 Gen. chairman' unquote. How does that strike you sense of fairness? Also remember that nothing was said about a reinstatement fee prior to the March 28th deadline. It was allways dues They never specified between dues & reinstatement till later.

Mr. Harris I believe I am morally & Legally right on this issue I intend to follow it to a conclusion, if need be, in the courts of the U S It may mean subpoena of records & men. I hope to bypass all of the notoriety if I can this where I hope youll be of some help with other members of the board.

Thanking you for your kind consideration, I remain

Sincerely Yours,

Vincent P. Brady
501 Calhoun Rd.
Bellevue Hills
Wil-Del"

On February 4, 1957, Brady again wrote to the IAM and each member of the Systems Board to request a rehearing, pointing out the misrepresentations (Exhibit P-75). He received a perfunctory reply that the Board decision was final and binding and there was no other recourse (Exhibit P-8). So he started suit.

After trial, the District Court found that Brady was discharged unlawfully and in violation of the Railway Labor Act, 45 USCA § 152 (Eleventh) and (Fourth) and, consequently, granted Brady reinstatement to the IAM and TWA with all benefits, and $10,617.80 damages for lost wages. However, the District Court denied Brady trial by jury on his claim to common law damages caused by the unlawful discharge.

The United States Court of Appeals for the Third Circuit affirmed the District Court decision by its opinion filed August 13, 1968.

Brady submits that the District Court and the Court of Appeals erred in denying Brady the right to recover common law damages from the IAM and TWA because of hostile and bad faith discrimination practiced upon him by the IAM, and in which TWA participated, causing his discharge.

ARGUMENT.

Brady respectfully submits that this Petition for Writ of Certiorari should be granted for the following reasons:

The ruling of the Court of Appeals for the Third Circuit that Brady, discharged from TWA in violation of the Railway Labor Act as a result of hostile discrimination, must exhaust internal union remedies before he can recover common law damages from the IAM and TWA is in direct conflict with decisions of the Fifth and Second Circuits.[14]

The United States Court of Appeals for the Third Circuit by its ruling on the question presented has decided an important question of Federal law which has not been, but should be, settled by this Court.

The United States Court of Appeals for the Third Circuit in its opinion filed August 13, 1968, stated in denying Brady's claim to common law damages:

> "It is conceivable that an award of damages by a Court against a union for hostile discrimination could supplement the relief available for a violation of § 2 (Fourth) (Eleventh). However, in this case, Mr. Brady's claim for such damages may not be sustained because of his failure to exhaust internal union remedies or to adequately explain that failure."

The Court based its reasoning for the above finding on the fact that Brady's second claim, alleging hostile discrimination, was directed only at the IAM, and not TWA. Therefore, the Court reasoned:

> "Such a claim involves the union-member relationship and not the employer-employee relationship."

Brady would agree with the court's reasoning if his membership in the IAM only had been cancelled and he

14. *Richardson v. Texas and New Orleans R. Co.*, 242 F. 2d 230 (5th Cir. 1957); *Cunningham v. Erie R. Co.*, 358 F. 2d 640 (2d Cir. 1966).

had been given the opportunity to exhaust administrative remedies. However, this was not the case. Brady's membership was cancelled on March 28, 1956, and he was given until April 4, 1956, to pay dues and a reinstatement fee (which would have meant loss of seniority) *or be discharged.* Brady appealed to the Systems Board on April 3, 1956, to explain that he had paid his dues, but to no avail, as he was discharged on April 9, 1956.

Although the April 9 discharge was cancelled by the IAM and Brady given until April 28, 1956, to pay a reinstatement fee, he was never advised that his remedy was to appeal to the higher levels of the IAM. On the contrary, he was constantly advised that he would be discharged if he did not pay a reinstatement fee and that his only recourse was to appeal to the Systems Board of Adjustment. Even Brady's request of April 18, 1956 (Exhibit P-19), that he be able to retender dues was rejected (Exhibit D-2).

The first notice Brady received was Miller's letter dated March 13, 1956, demanding dues by March 28, 1956, *or be discharged under the provisions of the TWA-IAM Bargaining Agreement* (Exhibit P-3).

The second notice Brady received was Coleman's March 28, 1956, letter demanding dues *and* a reinstatement fee by April 4, 1956 or be discharged (Exhibit P-4).

The third notice he received was Miller's April 11, 1956, letter demanding a reinstatement fee by April 26, 1956, or be discharged. Also, in this letter, Miller advised Brady that his remedy if he did not pay would be to appeal to the Systems Board (Exhibit P-4).

Brady was never given the opportunity to appeal his cancellation of union membership to the higher levels of the IAM. The March 13, 1956, letter gave him 15 days to pay or be discharged. The March 28 letter gave him seven days or be discharged. And the April 11, 1956, letter gave him 15 days or be discharged.

Not once was he informed that his membership had been cancelled and under the IAM Constitution he had 30 days to appeal to the International President (Exhibit P-7).[15]

Brady was discharged from his employment with TWA, as threatened, and the discharge was caused solely by reason of the hostile and bad faith discriminatory treatment accorded him by the IAM, and TWA is by law jointly responsible.[16]

When the IAM demanded Brady's discharge, and TWA acted pursuant to those demands, the matter no longer involved only the union-membership relationship. It was then a discharge case, and the IAM-TWA Bargaining Agreement controlled, not the IAM Constitution.[17]

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15. Sec. 9. Appeals may be taken from the decision of any L. L. or G. L. officer to the I. P., provided, however, that such appeals must be taken within 30 days after the decision. Thereafter appeals may be prosecuted in accordance with the provisions of Sec. 6, Art. XXIV.

16. *Cunningham v. Erie R. Co.*, 358 F. 2d 640, 645 (2nd Cir. 1966).

17. *Brady v. TWA and IAM*, 223 F. Supp. 361 (1963), in which Judge Wright stated: "In any event, the doctrine of exhaustion of internal union remedies is entirely inapplicable in situations, as here, which do not involve internal union problems. Under the Railway Labor Act, IAM is entirely free to reject Brady's tender of dues and even to expel him. It may do all of these things because they involve the union-member relationship and the Act leaves that untouched. But when the Union strikes at the employment relationship and has an employee discharged, that is a different matter. At that point, it ceases to be a solely internal union problem, if for no other reason, because the employer is now involved. Nor is there anything whatsoever in the statutory language or legislative history supporting the IAM's contention. The Taft-Hartley analogy—which Congress explicitly had in mind when it drafted 2 (Eleventh)—is again appropriate. No one has even suggested, much less held as as a matter of law, that an employee illegally discharged under a union security agreement, must exhaust internal union remedies before applying to the National Labor Relations Board for relief under Section 8(a)(3). Policies, such as the exhaustion doctrine, designed to give private organizations principal responsibiltiy for governing their internal affairs are, therefore, wholly inapposite in situations involving federal regulations of the employment relationship." (Citations omitted.)

For instance, under the IAM-TWA bargaining agreement, an employee who is discharged must protest that discharge to the Airline Systems Board of Adjustment within three days or forever waive the right to contest the discharge action. Therefore, since a discharge situation was involved, Brady was bound to follow the appellate procedures called for in the IAM-TWA bargaining agreement (Exhibit P-6).[18]

If Brady had not appealed his discharge to the Systems Board of Adjustment, but instead followed the appellate procedures specified in the IAM Constitution, he would have been forever barred from contesting the discharge action, and the IAM and TWA would have so argued.

Accordingly, if the reasoning of the United States Court of Appeals is followed, an employee must have the wisdom of Solomon to make the right decision to preserve all rights that would otherwise be available to him when unlawfully discharged.

According to the Court, Brady should have known to appeal his discharge both to the higher levels of the IAM and to the Systems Board, even though he was advised by the IAM that his remedy was to appeal to the Systems Board (Exhibit P-14).

Brady filed three appeals to the Systems Board. He appealed to Harris, V. P. Industrial Relations, TWA, to point out the misstatements of fact which the IAM had made to the Systems Board to secure his discharge (Exhibit P-68).[19]

Brady also wrote each member of the Systems Board, sending a copy to A. J. Hayes, International President of the IAM, to point out the misstatements upon which the Board relied in affirming his discharge (Exhibit P-75). The

18. Article XXVI (f) (page 64) of the TWA-IAM Bargaining Agreement.

19. See footnote 13, *supra*.

Systems Board replied to Brady that their decision was final and binding (Exhibit P-8). The copy of the letter sent to Hayes, the International President, sent certified mail, was returned unaccepted and unopened.

We submit that it would have been a futile act and totally unreasonable to require Brady after his discharge to pursue further internal union appellate procedures to contest his discharge.

Brady's only recourse was to the Federal Courts to obtain full relief, i.e., reinstatement, lost wages and common law damages that could be proven as being caused by the hostile discrimination practiced against him to secure his discharge.

The Federal Court, by reason of the unlawful discharge caused by the hostile discrimination had jurisdiction,[20] and once jurisdiction vested in the Federal Court, it had the power to decide all questions before it and grant both equitable and legal relief.[21]

However, to date, the Courts have refused Brady his day in Court to prove the damages he has suffered. And why? Because common law damages have never before been allowed in the union security discharge situation. The courts have expressed approval of such things,[22] but none have gone so far as to grant them.

There never has been a more compelling case for granting the relief requested than the one Brady presents

20. *Steele v. Louisville & Nashville R. R.*, 1944, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173; *Brotherhood of Railroad Trainmen v. Howard;* 1952, 343 U. S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283; *Conley v. Gibson,* 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80.

21. *Hurn v. Oursler,* 289 U. S. 238 (1933).

22. *Richardson v. Texas and New Orleans RR.*, 242 F. 2d 230 (5th Cir. 1957); *Nobile v. W. B. Woodward,* 200 F. Supp. 785 (Ed. Pa. 1962).

to this Court. Justice demands it. The IAM would not be swayed from their unlawful purpose to get rid of Brady at any cost, and TWA could have cared less, as they are completely indemnified by the IAM from loss. But for the unlawful discrimination and TWA's total indifference to Brady's plight, Brady would have been saved 12 years of litigation and the suffering, worry and expenses that accompany major litigation.

And there was discrimination and it was malicious and in bad faith. Why else would the IAM single out Brady, who was not even delinquent in paying dues, and cite him for discharge, when no other employee from Brady's local had ever been cited, or was cited subsequently, for discharge, although other employees became as much as seven months delinquent?

Why else would the IAM refuse a valid tender of dues within the time *they* specified, and then proceed to cancel his membership in the union and have him discharged?

Why else would the IAM refuse Brady one more chance in April, 1956 (after his first discharge was cancelled), when he explained to them that he had tendered his dues and would be willing to tender again?

Why else would the IAM intentially misstate essential facts to the Systems Board, facts which would have saved Brady's job if presented fairly and in good faith?

Why else would both the IAM and TWA totally ignore the appeals of Brady and his lawyer for reconsideration, after both the IAM and TWA knew what had taken place?

Brady should be given the right to a jury trial to prove common law damages caused by the malicious and bad faith discrimination practiced against him by the IAM, and in which TWA acquiesced.

The cases and authorities cited by the Court of Appeals in its opinion should not bar Brady's requested relief, as

not one of those cases involved the union security discharge situation.[23]

On the other hand, this Court (although the factual circumstances did not involve a union security discharge) has granted common law damages including punitive damages, against a union where its unlawful acts caused substantial harm.[24]

Wherefore, Brady respectfully requests that the United States Supreme Court grant Certiorari to review that part of the decision of the United States Court of Appeals for the Third Circuit, which denied Brady trial by jury on his claim to common law damages.

Respectfully submitted,

FRANCIS L. WHITE, JR.,
DUANE, MORRIS & HECKSCHER,
Of Counsel.

MORRIS DUANE,
Counsel for Cross-Petitioner Vincent P. Brady.

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23. *Gainey v. Brotherhood of Railway & Steamship Clerks,* 275 F. 2d 342 (3rd Cir.), cert. denied, 363 U. S. 811 (1960) and 313 F. 2d 318 (3 Cir. 1963), involved a question of whether or not the union had taken the necessary steps to compel the employer to abide by the terms of an agreement; *Foy v. Norfolk & W. Ry.,* 377 F. 2d 243 (4th Cir. 1967), involved a suit by an employee against the union and employer asserting that he was not promoted because of discriminatory practices on the part of the union; *Neal v. Systems Board of Adjustment,* 348 F. 2d 722 (8 Cir. 1965), involved a suit by employees accusing the union of discrimination in developing seniority classifications on a new job; and, *Detroy v. American Guild of Variety Artists,* 286 F. 2d 275 (2 Cir.), cert. denied, 336 U. S. 929 (1961) involved a suit by plaintiff against the union to have his name removed from a "National Unfair List".

In addition, the proviso contained in the Bill of Rights of Members of Labor Organizations, 29 USC § 411(a)(4) cited by the Court of Appeals was not enacted until 1959, three years after Brady's discharge.

24. *International Association of Machinists v. Gonzales,* 356 U. S. 617 (1957); *United Construction Workers v. Laburnum,* 347 U. S. 656 (1954).

SUPREME COURT, U. S.

FILED

NOV 5 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 712

THE INTERNATIONAL ASSOCIATION OF MACHINISTS, *Petitioner*,

v.

VINCENT P. BRADY, *Respondent*.

No. 713

TRANS WORLD AIRLINES, INC., *Petitioner*,

v.

VINCENT P. BRADY, *Respondent*.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

APPENDICES TO PETITIONS

Statutory Provisions and Opinions of District Court and Court of Appeals

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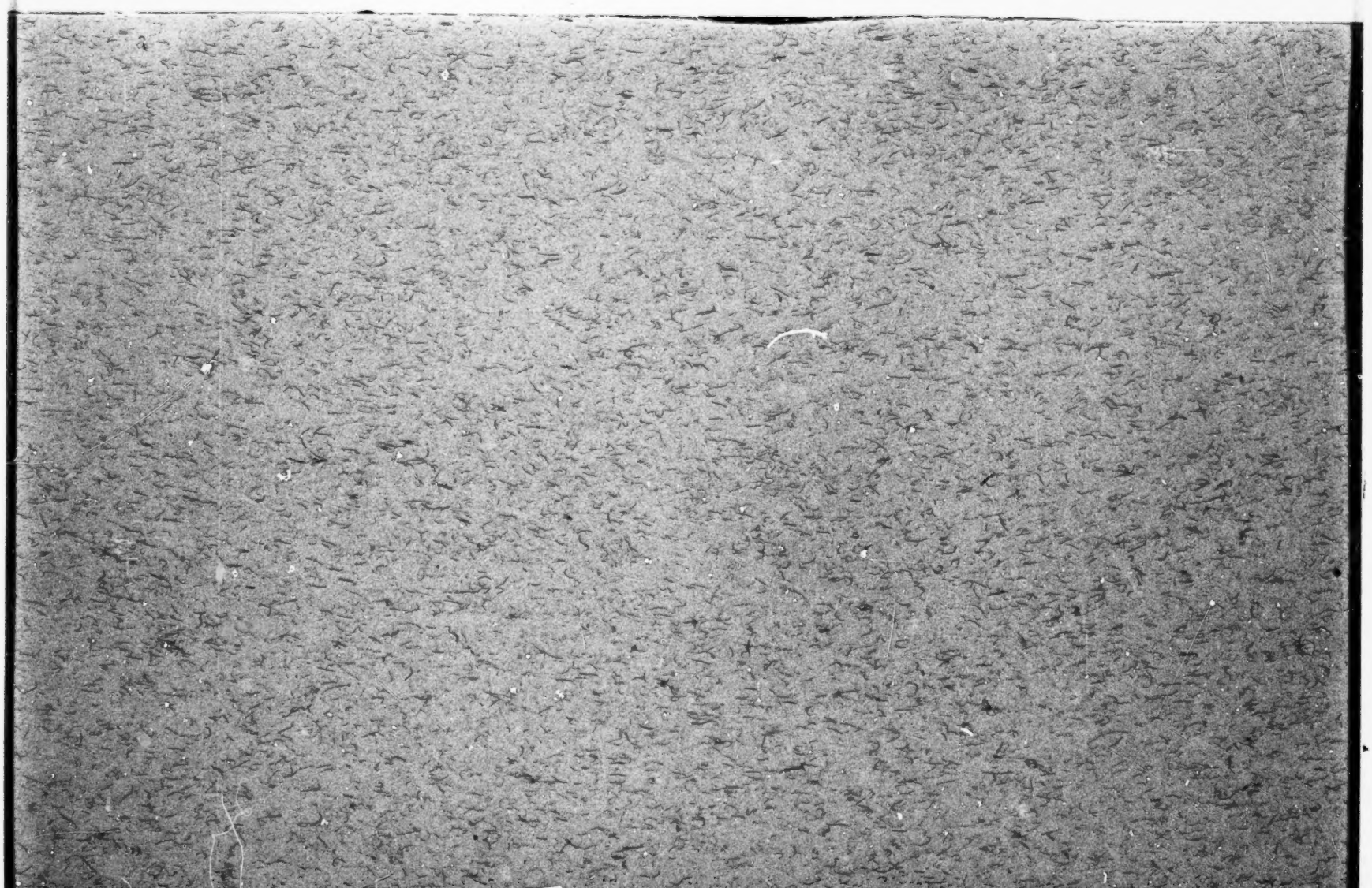

TABLE OF CONTENTS

	Page
APPENDIX A—Statutes Involved	1a-5a
APPENDIX B—Opinion of the United States Court of Appeals for the Third Circuit, August 13, 1968	6a-39a
APPENDIX C—Judgments of Court of Appeals, August 13, 1968	40a-42a
1. Judgment Case No. 16,266	40a
2. Judgment Case No. 16,267	41a
3. Judgment Case No. 16,268	42a
APPENDIX D—Opinions of United States District Court for the District of Delaware..	43a-115a
1. Opinion of October 5, 1957 (156 F. Supp. 82)	43a-57a
2. Opinion of October 28, 1958 (167 F. Supp. 469)	57a-66a
3. Opinion of June 10, 1959 (174 F. Supp. 360)	67a-80a
4. Opinion of July 11, 1961 (196 F. Supp. 504)	81a-86a
5. Opinion of May 3, 1962 (Unreported)	87a
6. Opinion of November 4, 1963 (223 F. Supp. 361)	88a-105a
7. Opinion of September 3, 1965 (244 F. Supp. 820)	106a-109a
8. Memorandum Opinion of September 6, 1966 (Unreported)	111a-113a
9. Order of September 6, 1966 (Unreported)	114a-115a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

THE INTERNATIONAL ASSOCIATION OF MACHINISTS, *Petitioner,*

v.

VINCENT P. BRADY, *Respondent.*

No.

TRANS WORLD AIRLINES, INC., *Petitioner,*

v.

VINCENT P. BRADY, *Respondent.*

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

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APPENDICES TO PETITIONS

Statutory Provisions and Opinions of District Court and Court of Appeals

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APPENDIX A

Statutes Involved

SEC. 2, First. [45 U.S.C.A., Section 152] It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a

carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.

Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) To make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and pen-

alties) uniformly required as a condition of acquiring or retaining membership.

(b) To make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in Section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deduction from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier who is not a member of any one of the labor organizations, national in scope, organized

in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provision in paragraphs Fourth and Fifth of Section 2 of this Act in conflict herewith are to the extent of such conflict amended.

SECTION 204. [45 U.S.C.A., Section 184] The disputes between an employe or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing up the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

APPENDIX B

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16266, 16267 and 16268

VINCENT P. BRADY

v.

TRANS WORLD AIRLINES, INC., and THE INTERNATIONAL ASSOCIATION OF MACHINISTS

VINCENT P. BRADY, *Appellant in No. 16266*

TRANS WORLD AIRLINES, INC., *Appellant in No. 16267*

THE INTERNATIONAL ASSOCIATION OF MACHINISTS, *Appellant in No. 16268*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued September 26, 1967

Before McLAUGHLIN, HASTIE and FORMAN, *Circuit Judges.*

Opinion of the Court

(Filed August 13, 1968)

By FORMAN, *Circuit Judge.*

This litigation, protracted over more than eleven years, concerns the suit brought by Vincent P. Brady against his union, The International Association of Machinists (IAM),[1]

[1] The present name of this organization is International Association of Machinists and Aerospace Workers.

for breach of its duty of fair representation, and his employer, Trans World Airlines, Inc. (TWA), for wrongful discharge violative of the Railway Labor Act.[2] In an order filed November 4, 1963, the United States District Court of the District of Delaware found against TWA and IAM on the issue of liability. By its order filed September 6, 1966, Mr. Brady was awarded damages by way of back pay and reinstatement in both his former employment and in his union membership. From these and previous orders TWA[2a] and IAM[2b] appealed. Mr. Brady has cross-appealed maintaining that the District Court erred, among other things, in so far as it limited the recoverable damages.[2c]

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[2] 45 U.S.C. § 151 *et seq.*

[2a] TWA noticed its appeal from the "final judgment entered . . . on September 6, 1966 . . . except so much as provides 'that plaintiff's application to join as a party-plaintiff plaintiff's wife be and the same is denied' and from each and every other order entered herein which entered into the making of said final judgment."

[2b] IAM noticed its appeal from the following:

"(1) The portion of the order of November 12, 1959, denying defendants' motions to dismiss the second amended complaint and to strike certain portions thereof;

"(2) The portion of the order of August 4, 1961, denying defendants' motions for summary judgment;

"(3) The order of November 4, 1963, holding defendants to be liable to the plaintiff;

"(4) Paragraphs one through six of the order of September 6, 1966, awarding damages to the plaintiff."

[2c] In his notice of appeal, as amended, Mr. Brady particularized the denial by the District Court of

(1) His demand for a jury trial

(2) His applications for

(a) punitive damages

(b) attorneys' fees and costs

(c) the value of free passes available to employees of TWA and

(d) leave to join his wife as a party plaintiff.

The complicated factual background of this case has been amply set forth in the several opinions of the District Court.[3] Therefore the particular facts will be adverted to herein only as they are necessary for a general understanding of the several issues raised in these appeals.

In 1951, Mr. Brady, who was previously employed by TWA, was rehired as a line mechanic and worked at the Philadelphia International Airport until May 15, 1956, the date of the alleged wrongful discharge. During this period he was a member of Local Lodge 1776 of IAM. In October 1955, a campaign was begun to raise the membership dues of Local 1776. At the November 1955 meeting the lodge members voted to raise the dues for persons in Mr. Brady's classification from $3.00 to $3.25 per month. Many members of the lodge who like Mr. Brady, had not been present, complained to him, as a shop steward, about the dues increase because they had not received sufficient notice of the time and place of the November meeting. At the December meeting, the members adopted Mr. Brady's motion that the prior dues increase be rescinded; that the issue be brought before the next general membership meeting after the posting of due notices. Nevertheless, notices were not posted and the general membership meeting was not held in January.[4] In

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[3] 156 F. Supp. 82 (D. Del. 1957); 167 F. Supp. 469 (1958); 174 F. Supp. 360 (1959); 196 F. Supp. 504 (1961); 223 F. Supp. 361 (1963); 244 F. Supp. 820 (1965); Civil No. 1884 (D. Del., filed September 6, 1966). The first of these citations reports the opinion of the late Chief Judge Paul Leahy who retired after its filing. The other citations refer to opinions by Chief Judge Caleb M. Wright.

[4] A special meeting was held in January 1956, but no mention was made of the dues question. When the dues matter was again handled at the February meeting in a manner unsatisfactory to him, Mr. Brady wrote a letter to A. J. Hayes, International President of the IAM, and Eric Peterson, Financial Secretary of the Grand Lodge, describing and protesting as illegal the manner in which the dues for Local Lodge 1776 had been increased. In his letter Mr. Brady enclosed his dues book and a check for three

protest to what he considered to be an illegal dues increase, Mr. Brady refused to pay his monthly dues at the new rate. Frequently thereafter he tendered his dues at the old rate and since these tenders were always rejected the record indicates that his last dues payment was for November 1955.

In January 1956, Gerald C. Coleman became the financial secretary of Local Lodge 1776. Shortly after assuming his office, Mr. Coleman began a program to collect all back dues from members of the lodge. On February 15, 1956, he posted a list of the nine members who on that date still owed dues for two or more months. Mr. Brady was then listed as owing dues for December and January. This posted notice threatened the nine members with action from the district office unless the dues were paid withn ten days. At the end of this ten day period, of those listed, only Mr. Brady, who continued to tender dues at the $3.00 rate, remained delinquent.

On March 3, 1956, Mr. Coleman cited Mr. Brady to Clifford Miller, General Chairman of District 142, which had jurisdiction over Local Lodge 1776, for his dues delinquency and sought discharge action. Mr. Brady received a letter dated March 13, 1956, from Mr. Miller advising him that he had not complied with the union security provisions of the TWA-IAM collective bargaining agreement and that unless he paid outstanding dues for four months including those of March, by March 28, he would be discharged from his employment by TWA. In response to this letter, on March 27, 1956, Mr. Brady tendered his dues book and a check for $10.50 to Mr. Coleman.[5] On instructions from

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months dues at the old rate and stated that he would reimburse the lodge if future actions showed that his tender was insufficient. On February 17, 1956, Mr. Brady received a letter from Mr. Hayes which stated that the dues increase "was handled properly."

[5] Mr. Brady believed the dues increase for persons of his classification was fifty cents rather than twenty-five cents, so his check was intended to cover three months dues at the increased rate.

Mr. Miller, Mr. Coleman wrote Mr. Brady on March 28 rejecting his tender as insufficient. For the first time, he demanded payment by April 4 of a $25.00 reinstatement fee, allegedly due pursuant to the IAM Constitution, and $9.75 for three months dues.

Mr. Brady feared that if he paid a reinstatement fee he would lose the five years seniority that he had accumulated with TWA. On April 3, 1956, Mr. Brady filed his first appeal with the TWA-IAM System Board of Adjustment (Board). On April 7, 1956, Mr. Coleman wrote to Mr. Miller advising him of Mr. Brady's failure to make payment as demanded. Mr. Miller, on April 9, 1956 certified to TWA that Mr. Brady should be discharged for violating the union security provision of the collective bargaining agreement. On April 10, TWA notified Mr. Brady of this certification.

At this point, Mr. Miller realized that Mr. Coleman had misunderstood the instruction given him and had mistakenly demanded in the letter of March 28, 1956, both a reinstatement fee and outstanding dues. Mr. Miller immediately cancelled Mr. Brady's discharge certification and on April 11, wrote to Mr. Brady explaining Mr. Coleman's error and demanding only payment of the $25.00 reinstatement fee by April 26. Mr. Brady answered Mr. Miller's letter by offering to pay all dues outstanding but requesting that he should be permitted to forego the reinstatement fee. Mr. Miller rejected this offer and again demanded the reinstatement fee. On April 24, Mr. Brady filed his second appeal to the Board arguing that he had not violated the union security provisions of the collective bargaining agreement. This appeal was dismissed at a hearing on May 4 as premature since it had been filed prior to May 1, 1956, the date of a second certification for discharge which Mr. Miller had sent to TWA. On May 5, 1956, Mr. Brady made a third appeal to the Board protesting the May 1 certification. A

hearing was held on May 14,[6] and the Board ruled that the discharge was proper under the union security provisions of the collective bargaining agreement. Accordingly, Mr. Brady was discharged from his employment by TWA effective May 15, 1956.

After unsuccessfully seeking a rehearing by the Board, on the charge that Mr. Miller had misrepresented facts at the hearings of May 4 and May 14, Mr. Brady, on April 22, 1957, filed a complaint in the District Court charging IAM with hostile discrimination in breach of its duty of fair representation and TWA with wrongful discharge in violation of the Railway Labor Act. Mr. Brady sought relief against IAM and TWA by way of reinstatement in the union and in his employment together with compensatory and punitive damages.

—I—

At the outset, both IAM and TWA challenge the subject matter jurisdiction of the District Court. They submit that pursuant to section 204 of the Railway Labor Act,[7] Article XII of the TWA-IAM collective bargaining agreement established a System Board of Adjustment to adjust and decide disputes or grievances arising out of the interpretation and application of the agreement. Paragraph (k) of Article XII provides that decisions of the Board in cases properly before it shall be final and binding on the parties. Article XXVI(f), one of the union security provisions, gives an employee the right to appeal his discharge to the Board. Several cases are cited which uphold the finality of adjust-

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[6] Mr. Brady did not attend the hearings of May 4 and May 14, held in Kansas City, Missouri, because, as he said in his letter to the Board, he believed the Board had before it all the necessary factual documents to substantiate his position.

[7] 45 U.S.C. § 184. The Railway Labor Act was made applicable to "carriers by air" in 1936. 45 U.S.C. § 181 *et seq.*

ment board decisions and circumscribe their reviewability by the courts.[8]

Focusing on these contractual provisions, it is argued that Mr. Brady elected to appeal to the Board, that hearings were held by that body on May 4 and May 14, 1956, and that Mr. Brady's discharge was determined to be proper under the collective bargaining agreement. Having elected to take this appeal to the Board, the assertion is made that its adverse decision is final and binding on Mr. Brady and that the courts may not review the merits of that decision. This argument, which seeks to sustain the Board's ruling, and to foreclose judicial review of the dispute, was properly rejected by the District Court.

The complaint in this case, as amended, charges IAM, which throughout the period in question was the plaintiff's exclusive bargaining agent, with hostile discrimination in refusing to accept tender of Mr. Brady's dues because of claimed delinquency, terminating his union membership and wrongfully citing him for discharge from his employment with TWA, actions which, it is alleged, IAM did not take against other members of Local Lodge 1776 who were said to be delinquent in the payment of their dues. Furthermore, IAM is charged with hostile discrimination in misrepresenting the facts pertaining to Mr. Brady's alleged dues delinquency at the hearings before the Board. These allegations make it clear, as the District Court noted, that plaintiff's controversy is primarily with his bargaining agent rather than his employer.

The propriety of disregarding the ruling of the Board is justified by an examination of the Board's statutory jur-

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[8] See, *e.g.*, Gunther v. San Diego A.E. Ry., 382 U.S. 257 (1965); International Ass'n of Machinists v. Central Airlines, 372 U.S. 682 (1963); Bower v. Eastern Airlines, 214 F. 2d 623 (3 Cir.), *cert. denied*, 348 U.S. 871 (1954).

isdiction. Section 204 of the Railway Labor Act [9] authorizes the establishment of air carrier adjustment boards and sets forth their jurisdiction as follows:

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . may be referred by petition of the parties or by either party to an appropriate adjustment board, . . ."

Subsequent language of this section limits the jurisdiction of air carrier adjustment boards to that granted to railway carrier adjustment boards as provided in section 3 of the Railway Labor Act.[10] The jurisdiction of railway carrier adjustment boards has been construed as encompassing disputes between employees and their employers, but not disputes between employees and their bargaining representatives. In *Conley* v. *Gibson*,[11] union members brought a suit against their bargaining agent for breach of its duty of fair representation. Their complaint was dismissed on the ground that the adjustment board had exclusive jurisdiction over the controversy. The Supreme Court, reversed, stating:

> "But § 3 First (i) by its own terms applies only to 'disputes between an employee or group of employees and a carrier or carriers.' This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. The Adjustment

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[9] 45 U.S.C. § 184.

[10] 45 U.S.C. § 153.

[11] 355 U.S. 41 (1957).

> Board has no power under § 3 First (i) or any other provision of the Act to protect them from such discrimination." [12]

The District Court, relying on *Conley,* correctly ruled that since the Board was without jurisdiction to hear Mr. Brady's claim, which essentially charges IAM with hostile discrimination, the Board's decision could not bar judicial review of the merits of that controversy. That the employer was joined to afford complete relief and that the dispute may incidentally involve construction or interpretation of the collective bargaining agreement does not change the basic fact that the Railway Labor Act does not authorize adjustment boards to hear an employee's dispute against his union.

There is good reason for denying the jurisdictional authority of adjustment boards in so far as controversies between employees and their bargaining representatives are concerned. The membership of such boards is designed ot give representation to management and to the union.[13] Normally the board's composition would present no problem since its express statutory authority is to hear grievances between employees and their employers arising out of the collective bargaining agreement. In such a dispute the employee would expect his union, acting under its duty to prosecute fairly the grievances of its members, to repre-

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[12] *Id.* at 44-45. See Rumbaugh v. Winifrede R.R., 331 F. 2d 530 (4 Cir.), *cert. denied,* 379 U.S. 929 (1964); Cunningham v. Erie R.R., 266 F. 2d 411 (2 Cir. 1959); Wade v. Southern Pacific Co., 243 F. Supp. 307 (S.D. Texas 1965); Nobile v. Woodward, 200 F. Supp. 785 (E.D. Pa. 1962).

[13] Article XII(b) of the TWA-IAM collective bargaining agreement provides:

> "The System Board of Adjustment shall consist of four (4) members, two (2) selected by the Company and two (2) selected by the Union."

sent him before the board. This scheme, however, overlooks the possibility that the union's interest might conflict with the employee's and this is especially so in cases where the employee is charging the union with hostile discrimination. In such circumstances, the union can hardly be expected to press the employee's claim vigorously and forthrightly. The District Court's statement on this point bears reiteration:

> "It is simply repugnant to our standards of fundamental fairness and totally unrealistic to require an employee to submit a dispute he has with his bargaining agent for final determination to persons selected by and representing the bargaining representative." [14]

The decision of this court in *Bower* v. *Eastern Airlines*[15] is relied on by IAM and TWA as requiring a recognition of the Board's ruling as final and binding upon the parties. In that case, Bower, having been discharged from his employment, appealed to the board charging his employer with wrongful discharge. The board sustained the discharge and Bower then reasserted the same claim in the District Court. This court held that the employee, having elected the administrative remedy in seeking settlement of a dispute concerning his employment could not obtain a judicial reexamination of the merits of the dispute. But the court went on to say: "This does not foreclose the consideration of questions of jurisdiction or of the essential fairness of the administrative proceedings, even when these issues are raised collaterally." [16] The situation presented by the present case seems to come squarely within the caveat of *Bower*. Moreover, it is significant that in *Bower*,

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[14] 167 F. Supp. at 472.

[15] 214 F. 2d 623 (3 Cir.), *cert. denied*, 348 U.S. 871 (1954).

[16] *Id.* at 626.

and like cases advanced with it, employees sought relief against their employers and not their unions.[17]

The conclusion that because the Board lacked jurisdiction to hear the dispute its decision does not preclude an independent judicial review of the controversy, of course, does not itself establish the District Court's jurisdiction. Here, the District Court, however, properly found that Mr. Brady had pleaded causes of action invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1337.

It is now well established that an exclusive bargaining agent has a fiduciary obligation imposed by federal law to fairly represent all those employees in the bargaining unit in the negotiation, administration, and enforcement of collective bargaining agreements.[18] The federal courts have subject matter jurisdiction to enforce this statutory duty of fair representation which imposes on the union an obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[19] Although this duty imposed on the bargaining agent was originally restricted to the prevention of hostile

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[17] Gunther v. San Diego & A.E. Ry., 382 U.S. 257 (1965); International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963); Elgin J.&E. Ry. v. Burley, 325 U.S. 711 (1945) (involved authority of union to exclusively represent employees before the National Railroad Adjustment Board and to settle their contract claims against employer); Finlin v. Pennsylvania R.R., 288 F. 2d 826 (3 Cir. 1961); Woolley v. Eastern Air Lines, 250 F. 2d 86 (5 Cir. 1957), *cert. denied*, 356 U.S. 931 (1958); Sigfred v. Pan American World Airways, 230 F. 2d 13 (5 Cir.), *cert. denied*, 351 U.S. 925 (1956).

[18] Conley v. Gibson, 355 U.S. 41 (1957); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Elgin, J.&E. Ry. v. Burley, 325 U.S. 711 (1945); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

[19] Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

discrimination based on racial prejudice,[20] it is now recognized that the statutory power conferred on unions imposes on them a corresponding duty which encompasses the prohibition of all forms of hostile discrimination.[21]

Mr. Brady sets forth in his complaint, as amended, allegations of "wilfull and deliberate" discrimination by the IAM, such as the arbitrary invocation of union security provisions which caused him to be discharged from his employment by TWA. These allegations clearly constituted a claim against IAM cognizable in the District Court. The assertion of TWA that the court lacks jurisdiction over the employer in such a suit has been clearly answered by the Court of Appeals for the Second Circuit in *Cunningham* v. *Erie R.R.*[22] In that case, which is strikingly similar to the instant case, the court stated:

> "If the District Court has jurisdiction to proceed against the union it is clear, we think, that it has also power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments."[23]

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[20] Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952).

[21] Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Rumbaugh v. Winifrede R.R., 331 F. 2d 530 (4 Cir.), *cert. denied*, 379 U.S. 929 (1964); Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (4 Cir. 1963); Cunningham v. Erie R.R., 266 F. 2d 411 (2 Cir. 1959); Nobile v. Woodward, 200 F. Supp. 785 (E.D. Pa. 1962).

[22] 266 F. 2d 411 (2 Cir. 1959).

[23] *Id.* at 416. The policy of preventing the fragmentation of the controversy and adjudicating the entire matter in a single forum to assure complete relief was followed in Rumbaugh v. Winifrede R.R., 331 F. 2d 530 (4 Cir. 1964); Wade v. Southern Pacific Co., 243 F. Supp. 307 (S.D. Texas 1965); Nobile v. Woodward, 200 F. Supp. 785 (E.D. Pa. 1962).

Apart from the foregoing, Mr. Brady has stated other grounds which validly invoke the jurisdiction of the District Court against both IAM and TWA. He charges both defendants with causing his discharge in violation of section 2 (Eleventh) of the Railway Labor Act [24] which, in part, provides:

> "Eleventh. Notwithstanding any other provisions of this chapter, . . . any carrier or carriers . . . and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

There is no need to repeat the District Court's lengthy and careful analysis of this provision, its intended purposes and its effect on the court's jurisdiction of the present case. In

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[24] 45 U.S.C. § 152 (Eleventh). Hereafter paragraphs of 45 U.S.C. § 152 will be designated simply by their place in section 2 of the Railway Labor Act.

sum, the District Court reasoned that section 2 (Eleventh), which permits union shop agreements within prescribed limits, was intended as a proviso to section 2 (Fourth) (Fifth), which prohibited all employer conduct designed to influence or coerce employees to join or maintain membership in a labor organization.[25] In so analyzing the Railway Labor Act the District Court considered Mr. Brady's complaint as alleging that his discharge was not protected by the exception to prohibited employer conduct (section 2 (Eleventh)) and because his discharge was designed "to influence or coerce employees in an effort to induce them to join or remain . . . members of [a] labor organization",[26] it violated the anti-discrimination provisions of section 2 (Fourth). The District Court further reasoned that since the court's jurisdiction over complaints alleging violations of section 2 (Fourth) was clearly established, that jurisdiction should encompass suits involving section 2 (Eleventh), the proviso to section 2 (Fourth).[27]

It is the contention of TWA and IAM that this case involves the interpretation and application of the union security provisions of the collective bargaining agreement and, therefore, the adjustment board has exclusive jurisdiction. This argument, which assumes that public statutory rights, when incorporated in a collective bargaining agreement, becomes exclusively private contract rights, is a reiteration of the same argument that was rejected by the District Court. Under the view expressed by TWA and IAM, an employee who seeks to regain his job after being

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[25] 223 F. Supp. at 364-365.

[26] 45 U.S.C. § 152 (Fourth).

[27] 223 F. Supp. at 365. The District Court recognized an exception to this rule (196 F. Supp. at 507 n. 11). Suits involving section 2 (Eleventh) (c) were specifically left to a special board rather than the courts. See 45 U.S.C. § 153(f); Pennsylvania R.R. v. Rychlik, 352 U.S. 480 (1957).

discharged for alleged nonpayment of dues is required to appeal to the adjustment board, which consists of an equal number of representatives of the employer and the union.[28] By permitting a limited form of union shop in section 2 (Eleventh), Congress intended to relax the anti-discrimination provisions of section 2 (Fourth) (Fifth).[29] In so relaxing them, it did not intend an appeal to the adjustment board as the sole recourse for an employee seeking reinstatement in his employment after being discharged for alleged nonpayment of his union dues. Otherwise, in such a dispute, which pits an employee against his union and his employer, the very parties whose power he challenged, would have the additional power of deciding whether they had exercised it in a proper manner. The District Court properly concluded that "if application and interpretation of 2 (Eleventh) is the sole province of Adjustment Boards, then Congress did not 'relax' the prohibitions of 2 (Fourth) (Fifth) by enacting 2 (Eleventh); it repealed them."[30]

The jurisdiction of the District Court over the subject matter of this suit was well founded in view of the allegations in the complaint as amended of hostile discrimination and of violations of Mr. Brady's rights under section 2 (Fourth) (Eleventh) of the Railway Labor Act.[31]

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[28] See note 13, *supra*.

[29] S. Rep. No. 2262, 81st Cong. 2d Sess. 1950; U.S. Code Congressional & Administrative News, Vol. II, p. 4320.

[30] 223 F. Supp. at 366.

[31] In the opinion reported at 174 F. Supp. 360, 365, the District Court raises sua sponte a third source of federal court jurisdiction, namely, the validity of the union security provisions of the collective bargaining agreement in light of 45 U.S.C. § 152 (Eleventh)(a). In view of the disposition of this case, it is not necessary to consider this further jurisdictional basis.

— II —

The suit was heard by the District Judge without a jury [32] first on the issue of liability [33] and later on the question of damages.[34] He construed the complaint as raising alternative grounds for relief—a claim for hostile discrimination in breach of the bargaining agent's duty of air representation, and a claim for wrongful discharge in violation of section 2 (Fourth) (Eleventh) of the Railway Labor Act. After the hearing on liability, the District Court ruled that because Mr. Brady had proven facts sufficient to support recovery on the second claim, it would not make findings on the hostile discrimination claim.

The District Court found that under the union security provisions of the TWA-IAM collective bargaining agreement, an employee, in order to continue his employment, was required to maintain membership in good standing in the union by paying his monthly dues not later than the last day of the following calendar month.[35] Under this stand-

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[32] In an earlier opinion, reported at 196 F. Supp. 504, the District Court ruled that Mr. Brady was not entitled to have the action tried by a jury because the main relief he sought, reinstatement, was equitable, the other requests for monetary compensation such as back pay being accidental. Secondarily, it was held that the statutes relied upon do not embrace actions at common law and are thus outside the scope of the Seventh Amendment.

[33] 223 F. Supp. 361.

[34] 244 F. Supp. 820.

[35] Article XXVI of the TWA-IAM collective bargaining agreement provides in pertinent part:

> "(a) Each employee now or hereafter employed in any work covered by this Agreement shall, as a condition of continued employment in such work, within sixty (60) days following the beginning of such employment or the effective date of this Article, whichever is later, become a member of, and thereafter maintain membership in good standing (as herein defined), in the Union, except as provided otherwise

ard, the December dues were payable by the end of January, those for January by the end of February and those for February by March 31. The District Court ruled that IAM's March 13 demand for four months dues by March 28 was clearly excessive since Mr. Brady was then only in arrears for two months, or $6.50. Thus, when Mr. Brady responded to the letter of March 13 by sending his dues book

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herein. Such condition shall not apply . . . with respect to any employee to whom membership is denied or terminated for any reason other than the failure of the employee to tender the dues uniformly required of other members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership.

"For the purpose of this Article, 'membership in good standing in the Union' shall consist of the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month, which are uniformly required of members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership."

* * *

"(e) When an employee becomes delinquent by not meeting the requirements of (a) above for 'membership in good standing in the Union', the following procedure shall be observed:

"(1) The General Chairman of the Union shall notify the employee by registered letter, return receipt requested, copy to the Company's Vice President of Industrial Relations, that the employee is delinquent in the payment of dues as specified herein and accordingly is subject to discharge as an employee of the Company. Such letter shall also notify the employee that he must make the required payment to the Financial Secretary of the Union's local lodge with jurisdiction at the location where he works within fifteen (15) calendar days of the date of mailing of the notice or be subject to discharge under the terms of the Agreement."

* * *

"(n) Whenever the term dues is referred to in this Article, such use of the word 'dues' shall include initiation or reinstatement fees, periodic dues, and assessments (not including fines and penalties), ..."

with $10.50 to the financial secretary of the local lodge, his tender was more than sufficient to pay his two months' arrearage,[36] and being valid, it precluded his discharge. Nor was any change wrought in the situation when IAM, by its letter of March 28 to Mr. Brady, rejected his tender as insufficient to cover three months dues of $9.75 and a reinstatement fee of $25 for which payment was not required by April 4. The rejection on the ground that the tender did not include the reinstatement fee was gratuitous for no such demand was made in the letter of March 13.

Under the IAM constitution a three months dues delinquency results in the automatic cancellation of membership[37] and to regain union membership a reinstatement fee must be paid. Although the collective bargaining agreement mentions reinstatement fees in its definition of dues, it does not specify when they are to be imposed. The District Court assumed that the IAM constitutional provision for a reinstatement fee was validly incorporated into the collective bargaining agreement by the "oblique reference" to such fees, and reasoned that this constitutional provision must be read in conjunction with the collective bargaining agreement which is the governing document under section 2 (Eleventh). On this approach the District Court found

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[36] Mr. Brady's tender of $10.50 was intended to cover three months dues, as explained in footnote 5, *supra*.

[37] Article E of the IAM constitution reads in pertinent part:

> "Sec. 14. Delinquency for 3 months in the payment of dues or assessments shall automatically cancel membership and all rights, privileges and benefits incident thereto. The period of good standing membership of members whose membership has been cancelled for delinquency, or other cause shall date from their last reinstatement, as shown by the G.L. records, and their rights, privileges and benefits under the provisions of this Constitution shall attach and date their last reinstatement, as though they had never before held membership in the I.A.M."

that the collective agreement postpones a delinquency until the end of the following calendar month. It therefore concluded that the three months delinquency did not occur until after March 31 and IAM could not properly impose a reinstatement fee, as it did, in its letter of March 28.

The basis for the District Court's reconciliation of the two documents was its view that the policy underlying section 2 (Eleventh), which validates a union security provision when incorporated into an "agreement", is to insure that employees will have adequate notice of their union security obligations and may rely on the provisions of the agreement rather than resort to ad hoc correspondence from union officials to determine their rights and duties. In this regard the District Court commented:

> "In the present case, however, the IAM's defense has been based almost exclusively upon letters sent to Brady which neither complied with the agreement nor were consistent with each other. There is no reason whatsoever why TWA and the IAM cannot incorporate clear union security provisions into their agreement which give adequate notice to the affected employees of the obligations imposed. Nor is there any reason why, having written such provisions into the agreements, they cannot apply them uniformly and comply with the requirements themselves. There is every reason why, however, they should not be allowed to discharge employees when they have failed to do these things. In the present case, the agreement is relatively clear, but IAM's rejection of Brady's March 27th tender did not comply with it and was utterly inconsistent with any obligations of which Brady had proper notice." [38]

Having concluded that Mr. Brady's tender of $10.50 on March 27 was "sufficient to cover 'the periodic dues * * *

[38] 223 F. Supp. at 369.

uniformly required * * *,' " and that no reinstatement fee could then have been imposed, the District Court held that the "discharge is not protected by 2 (Eleventh). It is, therefore, violative of 2 (Fourth)."[39] Liability was found to run against both IAM and TWA.

The foregoing views of the District Court are challenged by IAM and TWA principally on the ground that IAM's standard for "deliquency" was confused with the collective agreement's definition of "membership in good standing." Delinquency, they say, occurs when a member has not paid his dues for a calendar month by the last day of the following calendar month. Applying these standards to the present case, they conclude that because Mr. Brady had not paid his December, January and February dues he was delinquent for those three months on March 1. Accordingly his union membership, under the IAM constitution, was automatically cancelled. To regain his union membership he was required to pay a reinstatement fee. Failing to do so he was subject to discharge by TWA. Also, it is asserted that because Mr. Brady had not paid his December dues by January 31, he was no longer a member in good standing in IAM and was dischargeable under the terms of the collective bargaining agreement. In either case, they insist, IAM was justified in certifying Mr. Brady for discharge, and TWA was justified in discharging him.

We agree with the District Court's view that section 2 (Eleventh) makes the collective agreement the governing document and with the District Court's reconciliation of IAM's constitution with the agreement. The argument advanced by IAM and TWA is not persuasive and there are good reasons for rejecting it.

Even if the definition of "delinquency" which they propose is adopted, IAM was still unjustified in demand-

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[39] *Ibid.*

ing the payment of four months dues by March 28. Mr. Brady would not have become delinquent for March dues until after March 31. Thus, when he tendered $10.50 on March 27, it was more than sufficient to cover the dues delinquencies for the three months for which he was then in arrears. IAM admits that its letter of March 13 was erroneous in demanding the payment of four months dues by March 28 and that its letter of March 28 was again erroneous in demanding the payment of four months dues together with a reinstatement fee by April 4. It insists, however, that it "wiped the slate clean" on April 11 when it demanded only a reinstatement fee. This argument fails because while it attempts to explain away IAM's ineptness, it attempts also to "wipe the slate clean" of Mr. Brady's valid tender of dues sufficient to cover all past dues delinquencies. Mr. Brady's valid tender of dues made before IAM's certification for discharge under the union security clause precluded further discharge action against him.[40]

We are cognizant of the wholesome precepts which hold that healthy industrial relations cannot be preserved if unions are prevented from effective action to secure the prompt payment of dues where dues are required under a valid union security agreement and that a necessary concomitant of such effective action by a union is the responsibility of the employee that his dues are paid promptly

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[40] *Compare* International Union of Electrical Wkrs. v. NLRB, 307 F.2d 679 (D.C. Cir.), *cert. denied*, 371 U.S. 936 (1962) and NLRB v. Aluminum Wkrs. Int'l Union, 230 F.2d 515 (7 Cir. 1956), where a valid tender made before the union's certification was a barrier to the employee's discharge, *with* Producers Transport, Inc. v. NLRB, 284 F.2d 438 (7 Cir. 1960); NLRB v. Technicolor Motion Pictures Corp., 248 F.2d 348 (9 Cir. 1957) and International Ass'n of Mach. v. NLRB, 247 F.2d 414 (2 Cir. 1957), where the union's right to demand an employee's discharge was not barred by a belated tender of dues, made after the union's demand for discharge.

when due.[41] We do not intend to undercut these well stated pronouncements. But a delicate balance must be maintained between the union's right to preserve its own institutional existence and its sensitive obligations for fair dealing to its members under circumstances as are presented in this case. Mr. Brady cannot be characterized as the ordinary "free rider" absorbing union benefits without bearing a share in their costs. Rather he was a shop steward and had paid his dues until he challenged the manner in which they had been increased. While recalcitrant in accepting the new scale he ultimately relented and made a tender of all the past delinquencies prior to any demand by IAM upon TWA to discharge him.

However irritating IAM may have considered Mr. Brady's resistance to the relatively insignificant increase in the monthly dues, it still was his representative, clothed with the great power of separating him from his livelihood but also owing him the maximum of good faith and fair dealing. This imposed on it the obligation to inform him of his rights and duties so that he could take all necessary steps to protect his job.[42] If IAM seriously regarded Mr. Brady's membership as exposed to cancellation with consequent discharge on March 1, its fiduciary relationship with him compelled no less than an intimation to this effect instead of the erroneous demand of March 13 for four months dues by March 28. His response thereto on March 27 in the form of payment in excess of three months dues was sufficient to restore him to good standing. That offer preceded the next erroneous demand of IAM

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[41] See Producers Transport, Inc. v. NLRB, 284 F.2d 438 (7 Cir. 1960); NLRB v. Technicolor Motion Pictures Corp., 248 F.2d 348 (9 Cir. 1957).

[42] NLRB v. Hotel Employees Union, 320 F.2d 254 (3 Cir. 1963); International Union of Electrical Wkrs. v. NLRB, 307 F.2d 679, 683 (D.C. Cir. 1962).

for three months dues plus the first requirement to pay a reinstatement fee clearly indicating that IAM had indeed declared his membership automatically cancelled. The attempt to strike down the validity of his tender was totally inconsistent with the duty which IAM owed to Mr. Brady. When it chose not to accept the tender but elected to stand upon a precise enforcement of the automatic membership cancellation provision it erred, for the tender was timely to prevent rigid and severe enforcement of that provision.

The argument that after January 31, Mr. Brady was no longer a member in good standing of IAM and thus was dischargeable is also untenable. The collective bargaining agreement specifically sets forth procedural requirements which shall be observed when discharge is sought under the union security provisions.[43] IAM's failure to comply with them until after Mr. Brady had tendered dues sufficient to make him current also bars application of these provisions to him.

In the light of the foregoing we conclude, as did the District Court, that Mr. Brady's dues tender of March 27 was valid. Consequently IAM's certification to TWA was improper and his discharge by TWA violated section 2 (Fourth) (Eleventh) of the Railway Labor Act.

—III—

A. TWA challenges the District Court's conclusion that it is liable to Mr. Brady. Section 2 (Fourth) states, in part: "it shall be unlawful for any carrier . . . to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . ."[44] TWA insists that to constitute a

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[43] See note 35, *supra*.

[44] 45 U.S.C. § 152 (Fourth).

violation of this section it must be established, as it must be under section 8(a)(3) of the National Labor Relations Act, as amended, that the employer has "reasonable grounds for believing" [45] that union membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues uniformly required. The argument continues with the assertion that the District Court held the discharge of Mr. Brady not protected by section 2 (Eleventh) and therefore violative of section 2 (Fourth) on one basis—that IAM rejected Mr. Brady's dues tender although it was timely and sufficient to cover periodic dues uniformly required. TWA asserts that the District Court made no findings that it was guilty of wrongdoing, and without such findings, TWA cannot be held liable for discharging Mr. Brady after IAM certified that he had not complied with the union security provisions of the collective bargaining agreement.

To adopt TWA's view, would require the court to read the intent standard of section 8(a)(3) of the National Labor Relations Act into section 2 (Fourth) (Eleventh) where no such standard was supplied by Congress. The District Court properly declined to do so. It concluded that after the employee established that his rights under the statute had been violated, the employer would be held liable. The Court of Appeals for the Second Circuit, in *Cunningham* v. *Erie R.R.*[46] adopted and approvingly cited the District Court's opinion and stated:

> "Once it is established, as here, that the expulsion of the worker from membership in the Union was . . . 'for any reason other than the failure of the employee to tender the periodic dues * * *uniformly required* as a condition of acquiring or retaining mem-

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[45] 29 U.S.C. § 158(a)(3).

[46] 358 F.2d 640, 645 (2 Cir. 1966). See generally Note, 76 Yale L.J. 210 (1966).

bership,' . . . (emphasis added), the Railroad, having discharged the employee on the representation of the Union that he had failed to tender such periodic dues, uniformly required, is automatically liable for wrongful discharge. See Brady v. Trans World Airlines, D.C. Del., 1963, 223 F. Supp. 361. This is because the limited protection afforded by the Railway Labor Act is no longer available as a defense."

The Second Circuit explained that it is probably because of this *automatic liability* that collective bargaining agreements in the industry provide for indemnification of the employer by the union for all liability arising from an unlawful union security discharge.[47] Like the District Court and the Second Circuit, this court concludes that the employer's liability is automatic, once it is established that the discharged employee's section 2 (Fourth) (Eleventh) statutory rights have been violated.

Aside from this conclusion regarding the employer's liability under the Railway Labor Act, there is evidence in the record warranting TWA's liability under the more demanding standard which it advances. In *Radio Officers' Union* v. *NLRB*,[48] the Supreme Court examined section 8 (a)(3) of the National Labor Relations Act and discussed the proof of motive required to establish a violation of that section. It stated:

"But it is also clear that specific evidence of intent to encourage or discourage [union membership] is

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[47] Article XXVI(p) of the TWA-IAM collective bargaining agreement provides:

"The Union shall indemnify and save the Company harmless against all forms of liability that shall arise out of or by reason of action taken by the Company, which action was requested by the Union under the provisions of this Article (Union Security)." (Parenthesis supplied.)

[48] 347 U.S. 17 (1954).

> not an indispensable element of proof of violation of § 8(a)(3). . . . This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. . . . Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. *Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence.* In such circumstances intent to encourage is sufficiently established." [49]

While the *Radio Officers'* case did not deal with a discharge resulting from a union's certification that the employee failed to comply with its dues requirements, the facts of that case and the context from which the above language was taken, make the rule set forth therein applicable here. A discharge under a union security clause for failure to comply with the union's dues demands *inherently* encourages other employees to promptly comply with union "membership" requirements. In such circumstances, if the discharge is improper the employer will necessarily have discriminated against the employee and it will be *presumed* that the employer intended the foreseeable consequence of his act, that is, the encouragement of union membership.

In the instant case there is no finding that TWA rebutted the above stated presumption, nor does an examination of the record lead to that conclusion. On the contrary, the record discloses that immediately after he learned that his dues tender of March 27 would be rejected, Mr. Brady

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[49] *Id.* at 44-45. (Emphasis added.)

explained his dues dispute to the TWA General Foreman. Mr. Brady was simply advised to pay what the union demanded; later he was advised that the matter was merely one between him and IAM and that TWA was not involved. The record also indicates that TWA had copies of IAM's various letters to Mr. Brady which revealed the inconsistent positions taken by IAM. On these facts, it would be difficult to conclude that TWA overcame the presumption that it intended the foreseeable consequences of its act. Thus, the District Court's conclusion that TWA is liable to Mr. Brady for its violation of section 2 (Fourth) (Eleventh) is further fortified.

B. Having concluded that Mr. Brady's rights under the Railway Labor Act had been violated, a further question which then faced the District Court was whether the IAM should be held jointly liable with TWA for causing the wrongful discharge. Section 2 (Fourth) was designed to prevent employers from coercing employees with regard to their relationships with the unions. That section does not expressly refer to labor organizations, but section 2 (Eleventh) speaks in terms of the "agreement" which the employer and the labor organization may formulate. The District Court justifiably reasoned that since both the employer and the union were treated alike in section 2 (Eleventh), and that section is an exception to the anticoercion provisions of section 2 (Fourth), Congress contemplated that unions would also be held liable for causing a discharge in violation of section 2 (Fourth) (Eleventh).

That Congress intended labor organizations should be held accountable for violations of section 2 (Fourth) (Eleventh) is no more than rational. Generally, in dues disputes, it is the union which instigates the discharge, and an illegal application of the union security provisions can scarcely be originated by any other source than the union. Just as in hostile discrimination actions against the union where the employer has been declared a proper party de-

fendant,[50] in suits involving section 2 (Fourth) (Eleventh) unions should be held liable for their actions in procuring a discharge which violates the employees' statutory rights.[51]

Still with regard to the liability of IAM, brief mention should be made of its argument that the District Court erred in not granting judgment to it because of Mr. Brady's failure to exhaust his internal union remedies. The District Court correctly reasoned that this section 2 (Fourth) (Eleventh) phase of the case involves the legality of Mr. Brady's discharge from his employment and not the legality of IAM's dues increase. The doctrine, relied on by IAM, applies to situations unlike the present one, which concern wholly internal union matters. The present dispute focuses on the employment relationship rather than the union relationship. Furthermore, Mr. Brady is seeking reinstatement in his employment, a remedy that is unavailable to him within the internal union procedures. These reasons justified the District Court in determining that Mr. Brady was not required to exhaust his internal union remedies before bringing suit against IAM for violation of section 2 (Fourth) (Eleventh).

C. After holding that Mr. Brady's statutory rights had been violated and that as a result liability runs against both TWA and IAM, the District Court considered the remedies available to Mr. Brady. It concluded that appropriate for such a violation were reinstatement in his employment with back pay and reinstatement as a member in good standing in IAM.[52]

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[50] See note 23, *supra*, and accompanying text.

[51] That IAM should be held liable for its actions in causing a violation of section 2 (Fourth) (Eleventh) is all the more justified in the instant case since IAM is required to indemnify TWA for any liability imposed on it as a result of IAM's improper application of the union security provisions. See note 47, *supra*.

[52] The District Court discussed remedies at 244 F. Supp. 820 and in its unreported opinion at Civil No. 1884 (D.Del., filed September 6, 1966).

It is argued that the District Court was without authority to order Mr. Brady reinstated in his employment, and that in so doing the District Court departed from the rules established in several Supreme Court cases.[53] These cases are relied on for the proposition that an employee aggrieved by his discharge has alternative remedies: (1) if he wishes to retain his employment, he must pursue his remedy under the administrative procedures established by the applicable collective bargaining agreement subject to the Railway Labor Act and his right of review before the System Board of Adjustment; (2) if he accepts his discharge as final he may bring an appropriate action at law seeking money damages. In none of these cases was an employee discharged under a union security provision, and in each of these cases it was assumed that the adjustment board would have jurisdiction to hear the cause if the employee sought reinstatement before it. In part I above, it was held that the Board was without jurisdiction to entertain Mr. Brady's complaint which was directed against both TWA and IAM. Under these circumstances, when procedures for reinstatement are otherwise unavailable to him, the purposes of the Railway Labor Act would best be served if an employee seeking to regain his job may invoke the equitable powers of the court. We agree with the District Court that reinstatement, in the present case, was an appropriate remedy and that it had authority to so order.

The District Court implemented the reinstatement by requiring TWA to secure, without cost to Mr. Brady, such additional training and schooling as would be necessary for his reemployment in a position substantially equivalent to that which he would have attained had he not been dis-

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[53] Walker v. Southern Ry., 385 U.S. 196 (1966); Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953); Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950); Moore v. Illinois Central R.R., 312 U.S. 630 (1941).

charged. TWA vehemently objected because of the excessive cost of such a training program for Mr. Brady in light of the vast changes occurring in the airline industry during the interruption in his service. However, the District Court considered all the factors involved and properly concluded that although some hardship would be imposed on TWA, it should not bar Mr. Brady's restoration as an adequate aircraft mechanic. In requiring Mr. Brady's reinstatement, the District Court also correctly ruled that he was entitled to the fringe benefits he would have had if he had not been discharged.[54]

The back pay award of $10,617.80 was computed by subtracting from the amount Mr. Brady would have earned from TWA if he had not been illegally discharged, the amount he actually earned following his discharge. The arguments advanced against this award and the manner in which it was computed are without merit.

—IV—

The District Court took the position that whether Mr. Brady established his claim for hostile discrimination or his claim for violation of his express statutory rights under section 2 (Fourth) (Eleventh) his remedy would be the same. On this premise it declined to rule on the hostile discrimination claim once it was satisfied that a violation of section 2 (Fourth) (Eleventh) had been proved. We

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[54] Specifically the District Court ordered TWA to secure, without cost to Mr. Brady, his membership in the following Group Plans: Life Insurance, Hospital, and Health and Accident or the equivalents thereof. Membership in the Retirement Fund was also ordered with all payments due thereunder to be made by TWA, to be paid by it, and all payments due by Mr. Brady, to be paid by him. The District Court properly declined to award Mr. Brady any damages for the loss of the value of airline passes to which he would have been entitled had he continued to work for TWA on the ground that he had not introduced sufficient evidence on which such an award could be based.

agree that Mr. Brady was not entitled to recovery on his hostile discrimination claim, but we arrive at this result for reasons which differ from those of the District Court.

The complaint and its amendments are artlessly drawn and the prayers for relief are, to say the least, confusing. However, the District Court, with commendable liberality, interpreted them as raising two separate claims. The first, alleging violation of section 2 (Fourth) (Eleventh), which has been discussed at length, was directed at both TWA and IAM. This claim involved the legality of Mr. Brady's discharge from his employment. The second, alleging hostile discrimination in violation of its duty of fair representation, was directed at IAM. In so far as the first claim is concerned, we have agreed with the District Court that because it involved the propriety of the discharge, and thus the employment relationship, Mr. Brady was not required to exhaust his internal union remedies. With regard to the claim for hostile discrimination, the opposite conclusion is dictated.

In a suit alleging hostile discrimination violative of the bargaining representative's duty of fair representation, it must be proved not only that the union's actions were improper, but that they were undertaken with malice and bad faith.[55] Mr. Brady alleges that he was accorded different treatment from other members of his lodge who were similarly delinquent in their dues payments and also that at the hearing before the Board, Mr. Miller, an IAM official, misrepresented pertinent facts. In making these allegations, Mr. Brady is not challenging his discharge from his employment, but rather the fairness and propriety of the manner in which he was treated by IAM. Such a

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[55] Vaca v. Sipes, 386 U.S. 171, 190 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Cunningham v. Erie R.R., 266 F.2d 411, 417 (2 Cir. 1959).

claim involves the union-member relationship and not the employer-employee relationship.

It has been the general rule, and the rule of this circuit, that before a suit against a union for breach of its duty of fair representation may be brought in the courts, the member must first exhaust the available internal union remedies, or show an adequate reason for failing to do so.[56] There is good reason for this rule which forestalls judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own legitimate affairs. Mr. Brady was a shop steward and that he was knowledgeable of appellate union procedures may be inferred from his letter in February 1956 to the International President of IAM and others in which he protested the manner in which the dues of his local lodge were increased. Nevertheless, there is no allegation or evidence that he invoked any appellate union procedures to redress the asserted unfair and arbitrary action against him by the local and district officers. Nor does he advance an adequate reason for his failure to do so. Mr. Brady's argument that it would have been futile to ask IAM to review its own dealings with him is not tenable for IAM's internal procedure pro-

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[56] Gainey v. Brotherhood of Railway & Steamship Clerks, 275 F.2d 342, 345 (3 Cir.), *cert. denied*, 363 U.S. 811 (1960), and 313 F.2d 318 (3 Cir. 1963); see, *e.g.*, Foy v. Norfolk & W. Ry., 377 F.2d 243, 246 (4 Cir. 1967); Neal v. System Board of Adjustment, 348 F.2d 722 (8 Cir. 1965); Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2 Cir.), *cert. denied*, 366 U.S. 929 (1961). See the following proviso contained in the Bill of Rights of the Members of Labor Organizations, 29 U.S.C. § 411(a)(4):

> "*Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof."

vided reasonably prompt review of his contentions on union levels higher than those responsible for the decisions against him.[57]

It is conceivable that an award of damages by a court against a union for hostile discrimination could supplement the relief available for a violation of section 2 (Fourth) (Eleventh). However, in this case, Mr. Brady's claim for such damages may not be sustained because of his failure to exhaust internal union remedies or to adequately explain that failure. Having reached this conclusion, it is obviously unnecessary to consider Mr. Brady's demand for a jury trial on his claim for hostile discrimination and the propriety of the particular damages sought thereunder.[58]

Mr. Brady's successive attorneys before the District Court declined to press for the allowance of fees to them and his appeal from the denial thereof is baseless. His request for similar fees on this appeal is also without merit.

For the foregoing reasons, the orders of the District Court from which Vincent P. Brady has appealed at No. 16,266 and those from which Trans World Airlines, Inc. and The International Association of Machinists have respectively appealed at Nos. 16267 and 16268 will all be affirmed.

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[57] See International Ass'n of Machinists v. Friedman, 252 F.2d 846 (D.C. Cir.), *cert. denied*, 357 U.S. 926 (1958) where the court reveiwed the internal appellate procedures of IAM and deemed them fair and adequate.

[58] Mr. Brady demanded punitive damages against IAM and compensatory damages for mental anguish arising from the humiliation and embarrassment he suffered. By a belated application which was denied by the District Court, Mr. Brady moved to further amend his complaint to join his wife who sought damages for loss of his consortium.

Each of the parties to these respective appeals will bear his own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

Judgments of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,266

VINCENT P. BRADY, *Appellant*

v.

TRANS WORLD AIRLINES, INC., a corporation of the State of Delaware, and THE INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association

(D. C. Civil Action No. 1884)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: HASTIE, *Chief Judge*, and McLAUGHLIN and FORMAN, *Circuit Judges*.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 6, 1966, be, and the same is hereby affirmed. Each of the parties to this appeal to bear his own costs.

ATTEST:

THOMAS F. QUINN
Clerk

August 13, 1968

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,267

VINCENT P. BRADY, *Appellant*

v.

TRANS WORLD AIRLINES, INC., a corporation of the State of Delaware, and THE INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association

TRANS WORLD AIRLINES, INC., *Appellant*

(D. C. Civil Action No. 1884)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: HASTIE, *Chief Judge*, and MCLAUGHLIN and FORMAN, *Circuit Judges*.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 6, 1966, be, and the same is hereby affirmed. Each of the parties to this appeal will bear his own costs.

ATTEST:

THOMAS F. QUINN
Clerk

August 13, 1968

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,268

VINCENT P. BRADY, *Appellant*

v.

TRANS WORLD AIRLINES, INC., a corporation of the State of Delaware, and THE INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association

THE INTERNATIONAL ASSOCIATION OF MACHINISTS, *Appellant*

(D. C. Civil Action No. 1884)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: HASTIE, *Chief Judge*, and MCLAUGHLIN and FORMAN, *Circuit Judges*.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that that portion of the order of the said District Court, filed November 12, 1959, which denied defendant's motions to dismiss the second amended complaint and to strike certain portions thereof, the portion of the order, filed August 4, 1961, which denied defendant's motions for summary judgment, the order, filed November 4, 1963, holding defendants liable for damages, and paragraphs one through six of the judgment, filed September 6, 1966, awarding damages to plaintiff, be and the same are hereby affirmed. Each of the parties to this appeal will bear his own costs.

ATTEST:

THOMAS F. QUINN
Clerk

August 13, 1968

APPENDIX D

Opinions of the United States District Court for the District of Delaware

UNITED STATES DISTRICT COURT

D. DELAWARE.

Civ. A. No. 1884.

Vincent P. Brady, *Plaintiff,*

v.

Trans World Airlines, Inc., a corporation of the State of Delaware, and The International Association of Machinists, an unincorporated association, *Defendants.*

Oct. 5, 1957—156 F. Supp. 82

* * * * * * * * * *

LEAHY, Chief Judge.

The facts appearing from the paper record show: In 1948, plaintiff, Vincent P. Brady, became a member of The International Association of Machinists ("IAM") an unincorporated association, District Lodge No. 142, Local Lodge No. 1244, located in Wilmington, Delaware. Brady lived there. In February 1951, he was recalled by Trans World Airlines, Inc. ("TWA"), a Delaware corporation, for work in Philadelphia. In August 1952, he became a member of Local Lodge No. 1776 of the IAM in Philadelphia. On March 28, 1956, he was notified by the union he was in default on certain payments for dues and a reinstatement fee and the sum theretofore tendered by him was insufficient to cover this amount.[1]

On April 24, 1956, and May 5, 1956, Brady wrote to the System Board of Adjustment requesting a hearing, but without prejudice to his rights to file a subsequent court

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[1] Letter of March 28, 1956, from Gerald C. Coleman, Financial Secretary of Local Lodge No. 1776, IAM, to Vincent P. Brady.

proceeding.[2] Hearings were held by the Board in Kansas City, Missouri, on May 4 and 14, 1956. He had notice of these hearings. He did not attend. On May 14, 1956, the Board decided adversely to Brady.[3] On May 15, 1956, he was discharged from employment by TWA pursuant to the collective bargaining agreement between TWA and IAM which required good standing membership in the union as a condition of employment.[4]

On February 4, 1957, Brady wrote to the Board and requested reconsideration of its decision, alleging that Cliff Miller, General Chairman, District 142 of IAM, who appeared at the hearing of May 14, 1956, on behalf of IAM, misrepresented vital facts to the Board.[5] The Board denied this request and affirmed its May 14, 1956, decision as final and binding.[6] On April 22, 1957, Brady then brought his action to this court against both TWA and IAM seeking 1. reversal of the decision of the Board, 2. reinstatement of employment with payment to him of all wages, overtime pay, and vacation pay since his discharge, 3. reinstatement of all other benefits held by him as an employee including a $15,000 life insurance policy, a sickness and benefit policy, credit union privileges, retirement benefits and seniority status, 4. judgment against either or both defendants for damages for humiliation and embarrassment suffered by reason of the discharge without just cause by TWA, 6. allowance of a reasonable at-

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[2] Letters of April 24, 1956, and May 5, 1956, from Vincent P. Brady to the TWA-IAM System Board of Adjustment, Kansas City, Missouri.

[3] Order dated May 14, 1956.

[4] Article XXVI(a).

[5] Letter of February 4, 1957, from Vincent P. Brady to the TWA-IAM System Board of Adjustment, Kansas City, Missouri.

[6] Letter of February 14, 1957, from the TWA-IAM System Board of Adjustment to Vincent P. Brady.

torney's fee, and 7. such other relief as the court would deem proper.

Defendant's original motions were ones under Fed. Rules Civ. Proc. rule 12(b), 28 U.S.C. to dismiss plaintiff's action for lack of jurisdiction of the court over the subject matter of the complaint and for failure to state a claim upon which relief can be granted. In the light of developments at oral argument, counsel for both defendants requested the court to treat their motions as ones for summary judgment under FR 56(b).

I.

The Railway Labor Act, 45 U.S.C.A. § 151 et seq., originally passed in 1926, was amended ten years later to embrace carriers by air.[7] A look at the early cases under the Act is helpful to pinpoint the issues here.

1. The leading case of the Supreme Court in this area is Moore v. Illinois Central R. Co., 312 U.S. 630, 61 S. Ct. 754, 85 L.Ed. 1089. After discharge by the Illinois Central Railroad, Moore, an employee, refused the jurisdiction of the Adjustment Board, which had been set up as a board of review in 1934. Instead, he accepted his discharge as final and then brought suit in the state court for common law breach of contract. The action was transferred to the federal district court on diversity. When it reached the Supreme Court, it was held "petitioner was not required by the Railway Labor Act[8] to seek adjustment of his con-

[7] The complete story of the Act is available elsewhere. See Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency", 46 Yale L.J. 567, *et seq.*

[8] 45 U.S.C.A. § 153, First (i) provides:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall

troversy [with the railroad] as a prerequisite to suit for wrongful discharge." 312 U.S. 630, 636, 61 S. Ct. 754, 756. The Act, said the Court, did not require an administrative finding before the filing of suit, nor did it remove the jurisdiction of the courts to determine the controversy.

Subsequently, in Slocum v. Delaware, Lackawanna & Western R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L.Ed. 795, the Court, in denying the power of any court to invade the jurisdiction conferred on the Adjustment Board by the Act, specifically ruled the Moore case inapposite since interpretation there of a collective bargaining agreement provision had no binding effect on future interpretations by the Board. Thus it was held whereas the Adjustment Board had exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in Slocum, it did not have exclusive jurisdiction over the claim of an employee that he had been unlawfully discharged. The Moore case stood firm.

2. Although Moore came up on diversity of citizenship, no question arose of the employee's failure to exhaust remedies available under the employment contract when the state law of the forum required it. When it did, a host of problems were precipitated. Koppal, a discharged employee, bypassed, as Moore did, his right to an appeal before the Adjustment Board and elected to bring to the federal district court upon diversity, an action for wrongful discharge of employment. The jury returned a verdict for plaintiff, but after motion, the trial court set aside the verdict and dismissed the complaint, apparently impressed with the contention the administrative remedies

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be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

under the employment contract, which were comparable to those described in the Railway Labor Act, had not been exhausted by the plaintiff, as required by the state law of Missouri.

The Eighth Circuit reversed[9] on this ratio: The administrative adjustment of disputes did not have their source in or subject to appraisement on the basis of state law, but were questions relating solely to the federal Act; the nature of these provisions under the Act were settled by the Supreme Court in the Moore case, which was controlling. In the words of Judge Johnsen:

"In the face of the declaration and construction, Missouri would not, of course, be at liberty to hold contrarily that the adjustment provisions of a contract made under and pursuant to the Railway Labor Act were compulsory in nature and constituted conditions precedent to the right to sue for wrongful discharge in an employment relationship covered by the Act. Missouri law applicable to employment relationships under the Railway Labor Act, at least within the field of any matters regulated by the Act. So far as a suit for wrongful discharge is concerned, the administrative remedies prescribed by the Act and incorporated in a contract made under it would therefore have to be treated by the Missouri courts, for justiciable purposes in their forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained."[10]

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[9] Koppal v. Transcontinental & Western Air, Inc., 8 Cir., 199 F.2d 117.

[10] 199 F.2d at page 123.

The dissenting judge (Riddick, J.) concluded that exhaustion of remedies was a matter of substantive law which the forum could legitimately exact in a federal diversity case:

> "It is true that in the Moore case the Supreme Court said that the right of an employee to sue an employer for damages for breach of a collective bargaining agreement of employment was not dependent upon the prior exhaustion of the employee's administrative remedies under the Railway Labor Act. But to give that statement the meaning which the majority attribute to it is to lift it out of context and to to ignore the difference in character between rights and remedies available to an employee before the Adjustment Board under a contract made pursuant to the Railway Labor Act, and those available to him in a common law action for damages for breach of such a contract. * * * Since a proceeding under the Railway Labor Act before the Adjustment Board and an action at law in a District Court for damages for breach of contract are wholly different in character, assert different rights, and seek different remedies, in separate tribunals of mutually exclusive jurisdiction, it can not be said that before resorting to one action the litigant must first resort to the other. Where either action is available, the litigant has his choice. That is all the Moore case stands for. It certainly does not stand for the proposition that in an action for damages for breach of a Missouri contract, tried in a District Court in Missouri whose jurisdiction is based solely upon diversity of citizenship and the sum in controversy, the substantive law of Missouri is not controlling." [11]

3. The Supreme Court reversed the Court of Appeals and affirmed the District Court. Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed.

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[11] 199 F.2d at pages 126-127.

1325. In doing to, the Court's attention was drawn not to the impact of a federal act but to the demands of state substantive law. Thus, in the best tradition of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, it was announced (per Mr. Justice Burton for the Court [with Mr. Justice Douglas dissenting]) 345 U.S. at page 662, 73 S.Ct. at page 910:

> "* * * if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so. Here respondent was employed by a carrier, subject to Title II of the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with that Act. Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed."

The Moore case gave to the employee the legal right of choosing his course of relief—either the Adjustment Board or an independent action. Ostensibly, Koppal only conditioned the employee's legal right; in effect, it undermined it. The saving feature implied in Koppal, that the declared formality of exhaustion would in no way prejudice the employee in the bringing of an action, where that was his choice, proved almost worthless. Practical application of the Court's decision by the lower courts, exampled in Bower v. Eastern Airlines, Inc., 3 Cir., 214 F. 2d 623, became, for the discharged employee, a hazardous and even losing game.

4. Bower was discharged by his employer and, for reasons to be developed, appealed to the Adjustment Board. The appeal proved unavailing. Bower then brought an

action for wrongful discharge in the federal district court asserting diversity jurisdiction. The District Court dismissed the complaint, and the Third Circuit affirmed on the ground the appeal before the Board was a voluntary election, and, therefore, the Board's determination was "final and binding" under the provisions of the Railway Labor Act.[12] The Court (per Hastie, J.) wrote, 214 F. 2d at page 626:

"* * * Whether we say that the party is bound by his own voluntary election between an administrative

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[12] 45 U.S.C.A. § 184 provides, in part:

"The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier *designated to handle such disputes*; but, *failing* to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title."

45 U.S.C.A. § 153, First (m) provides:

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute."

and an alternative judicial remedy, or describe the party who initiated the administrative proceeding as estopped from denying its agreed final and binding character, or view this as an application of the rationale of *res judicata* in a new area, we are satisfied that the court should declare and enforce a rule of repose against the reexamination of the merits of plaintiff's claim in this case."

Bower raised the cry, expected, that the Koppal case necessitated the employee taking an administrative appeal before instituting suit, but the Court of Appeals disagreed. Koppal, like Moore, our Circuit said, "merely recognizes the duty of a federal court in a diversity action for wrongful termination of employment to require the plaintiff to show whatever exhaustion of administrative remedy may be prerequisite to suit under the procedural[13] law of the forum." Investigating the law of Pennsylvania, the Court could isolate nothing there to suggest a suit for wrongful termination of employment must be preceded by any administrative procedure beyond an unqualified dismissal that is not further reviewable within the employer's organization. Thus, it was judged, Bower did not have to obtain an Adjustment Board ruling on his contentions before invoking the jurisdiction of the district court. In short, on this question, Bower had misunderstood Koppal in thinking it required in every instance exhaustion of remedies, and, even had Bower correctly read Moore and Koppal on exhaustion, his move to go before the Board was binding on him because, as it turned out, Pennsylvania law did not in fact require it.[14]

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[13] The reference to "procedural" is not altogether squared with either the language of the dissenting opinion of the Court of Appeals in Koppal, *supra* note 11, or the language of the majority opinion of the Supreme Court in 345 U.S. 653, at pages 656-657, 73 S.Ct. 906, at pages 907-908.

[14] See, on this score, the dissent of Judge Brown in Sigfred v. Pan American World Airways, Inc., 5 Cir., 230 F.2d 13, 19 *et seq.*

5. Although the freely chosen alternative, stated in Moore and undisturbed in Slocum, has been impeded under Koppal,[15] the employee is not entirely on the defensive for this attitude has unleashed possibly new devices, equally undesirable. In those states unmistakenly requiring the exhaustion of remedies under the employment contract, the employee is awarded more than the alternative Moore intended to give him. He cannot only go before the Adjustment Board for reinstatement, but, if unsuccessful, thereafter bring suit for wrongful discharge asserting he looked to the Board only in deference to the niceties of state law, citing the authority of the Supreme Court in Koppal. Absent state requirement, he is bound to make a choice.

Whereas the discharged employee should be guided by simple procedures geared to the sensitivities of his hardship, in reality he has been subjected to the rigors of a guessing game. The difficulty is that the decision of the Supreme Court in Moore and its holding in Koppal are, when served, barely digestible in the same system. Beyond that, it may be asked whether the law has removed itself

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[15] Most recent is a decision of the Supreme Court in Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed. 2d 622. The issue was whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board. In holding it could not, the present Chief Justice, speaking for a unanimous eight-man court, asserted the Railway Labor Act, and specifically 45 U.S.C.A. § 153, First (i) and (m), *supra*, notes 8 and 12, literally means what it says—that a dispute may be referred to the appropriate Adjustment Board at the election of either party, in either which case the Board's decision becomes final and binding upon all parties concerned. (The Court went on to hold that the District Court had jurisdiction for injunctive relief notwithstanding the provisions of the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101, 115). This fresh discussion, as applied here—that is, the effect of the carrier, not the aggrieved employee, invoking the jurisdiction of the Board on the apparent ability of the employee to maintain his independent action—could mean new barriers for the employee to cross.

from the arena of common sense by adopting in the upper reaches an unrealistic approach. To put the Socratic question, does the employee who has been discharged, being thus of an uneven mind—hounded by the realization of loss of job and support for his family for an indefinite period; overwhelmed by the bigness of Organization—Union, Carrier—seemingly, and even actually, banded against him;[16] pressured by the increasing awareness he has so little time to act to seek job restoration;[17] and induced by the thought the Adjustment Board is the quickest, and even sole, means of doing so—grasp for relief almost blindly ignorant in most cases of his legal position? In any event, if indeed, a choice must be made, is that the selective and measured act for which he is later to be judged and refused admittance in the court house door?

II.

1. Facts of the case at bar do not quickly fall into any of the slots discussed. However, certain avenues, referred to in Bower, have been left open for the employee to exploit even after appeal adversely to the Adjustment Board.[18] It is toward these ends that plaintiff is moving. His contentions in attacking these motions are that because of a provision of the employment contract, Brady was deprived of a freely decided election to which he was entitled, and because of the alleged fraud perpetrated upon Brady and

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[16] Collective bargaining agreements usually provide, as does the agreement in the case at bar between TWA and IAM, *supra* note 4, that good standing in the union is a condition of employment with the carrier.

[17] Three days in the case at bar. Article XXVI(f) of the TWA-IAM Agreement, *infra* the text of this opinion.

[18] Described in these terms: "This does not foreclose the consideration of questions of jurisdiction or of the essential fairness of the administrative proceeding, even when these issues are raised collaterally." Bower v. Eastern Airlines, Inc., 3 Cir., 214 F. 2d 623, 626.

the Board of Adjustment their proceedings were robbed of essential fairness. Therefore, it is urged this court has the power to review the merits of plaintiff's case, reverse or affirm the Board's decision, and grant or deny the further relief requested in the complaint.

2. I first take up the question of whether Brady was deprived of his right to free selection as between appeal to the Adjustment Board and an independent action, since it may be dispositive of many entangling issues involved. This is in line with the permissive area of review defined by the Third Circuit in the Bower case.

Plaintiff refers to Article XXVI(f) of the TWA-IAM Agreement, which provides:

> "If the employee discharged or to be discharged under this Article contends that he is not properly subject to discharge under the terms of this Article, he may protest such action to the TWA-IAM System Board of Adjustment provided that such protest in writing is mailed to the Board within three (3) days after the date the employee is notified of such action. This protest shall be submitted in duplicate to the Chairman, TWA-IAM System Board of Adjustment, with one copy to be mailed in care of the Vice-President of Industrial Relations, TWA, Room 207 Administration Building, Municipal Airport, Kansas City, Missouri, and the other copy to be mailed in care of the General Chairman, IAM, Room 1019 Rialto Building, Kansas City, Missouri. Both copies shall be sent by registered mail, return receipt requested. The date of receipt of such written protest by the party with the representative who is Chairman of the System Board of Adjustment shall be considered as the date of receipt of the protest by the Board. *In the event no protest is so filed within the above time limits, the action will be considered as proper and will be final*

and binding upon all parties concerned. Within five (5) days of receipt of such a protest, the System Board of Adjustment will meet and consider the dispute * * *." (Italics supplied.)

Since the agreement was made and entered into in accordance with the provisions of the Railway Labor Act, as amended, the policy declared therein is paramount. From a plain reading of Article XXVI(f) it is evident that if a discharged employee filed no protest with the System Board of Adjustment, his discharge would, by virtue of his failure, be conclusive upon him. Such a provision is a far cry from what the Supreme Court held in the Moore case and reaffirmed in Koppal as to the solidarity of the employee's position. In the eyes of Brady, any discharged employee, it could do no other but mislead. I find the effect of Article XXVI(f) of the TWA-IAM Agreement entirely vitiated the freedom of action to which the discharged employee was entitled in choosing his course.[19] While the fact that Brady did expressly condition his ap-

[19] Indicative of the confusion engendered even to parties familiar with the procedural aspects of an appeal is the situation in the case at bar. Formal notification of discharge did not reach Brady until May 4, 1956. The Agreement provides, in Article XXVI(f), that the protest must be mailed to the System Board of Adjustment within three days thereof, and that hearing must be held within five days after receipt. Brady, by letter of April 24, 1956, to the Board requested an appeal. The Chairman of the Board replied by letter of April 30, 1956, in which he set May 4, 1956, as the date for hearing. After presentation of all the evidence at the hearing on that date (the hearing was centrally located for employees—Kansas City, Missouri) the Board ruled that since Brady did not receive formal notification of discharge until May 4, 1956, his request for appeal of April 24, 1956, was premature. Consequently, Brady was obliged to write again to the Adjustment Board within three days of May 4, 1956. He did so by letter of May 5, 1956, which was received on May 9, 1956, thus necessitating a hearing on or before May 15, 1956. A hearing was held on May 14, 1956. Brady was discharged on May 15, 1956.

peal to the Adjustment Board[20] does not thereby reserve any rights to him, as plaintiff has argued, it does indicate the existence of a coercive force operating on the discharged employee's free selection of alternatives and his own meager effort to counteract that force. Consequently, a free election must be deemed as being nullified under these circumstances.[21]

3. It thus remains to determine where plaintiff now stands in this suit. No case is known to this court in which a ruling of an Adjustment Board has been stricken down on the grounds left to us in the Bower case. However, in view of the nature of the cause, it can only be that the appeal by the discharged employee to the System Board of Adjustment must be considered as never having been entered at all. Plaintiff's position, therefore, with respect to the allegations of fraud and all other matters bearing on the decision of the Board, is bypassed. Brady will be given the opportunity to elect he never had.

Whether plaintiff chooses to pursue his appeal to the Board, or to commence an independent action is a decision left, of course, to him. It is noted, however, that should he start suit for wrongful discharge in the state court of Delaware, he must be prepared to meet the challenge of exhausting remedies, if Delaware so requires, as heretofore discussed; if he should elect to sue in federal court, the usual jurisdictional requirements must be satisfied.

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[20] Letters of April 24, 1956, and May 5, 1956, from Vincent P. Brady to the TWA-IAM System Board of Adjustment, Kansas City, Missouri.

[21] The importance of adhering to Article XXVI(f) was stressed by the Adjustment Board itself in its ruling of May 4, 1956, which found the appeal at that time not properly before it and granted additional time to Brady to perfect it. Said the Board: "The Board calls your attention to Article XXVI(f) 'In the event no protest is so filed within the above time limits, the action (discharge) will be considered as proper and will be final and binding upon all parties concerned.' "

4. Defendants' motions are denied. I will entertain an order not inconsistent with this opinion either staying this action or dismissing it without prejudice, the date from which plaintiff has, in accordance with the provisions of the TWA-IAM Agreement, three days to select his forum.

Plaintiff submit order.

* * * * * * * * * *

Vincent P. Brady, *Plaintiff,*

v.

Trans World Airlines, Inc., a corporation of the State of Delaware, and The International Association of Machinists, an unincorporated association, *Defendants.*

Civ. A. 1884.

United States District Court

D. Delaware.

Oct. 28, 1958—167 F. Supp. 469

* * * * * * * * * *

CALEB M. WRIGHT, Chief Judge.

[1] This matter is before the court on reargument of the decision rendered in Brady v. Trans World Airlines, Inc.,[1] directed primarily to the impact the recent Supreme Court pronouncement in Conley v. Gibson[2] had upon the Brady determination. Consenting to rehear counsel is a proper exercise of this court's discretion since Judge Leahy, the author of the Brady decision, by reason of retirement was "unavailable" within the purview of United

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[1] D.C. Del. 1957, 156 F. Supp. 82.

[2] Conley v. Gibson, 1957, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80.

States v. Wheeler.[3] It is, however, with a great deal of restraint and deference that reargument has been ordered in view of Judge Leahy's able opinion.

The issues raised by the parties have been exhaustively explored and for purposes of delineation will be briefly set forth and considered seriatim:

I. Does the System Board of Adjustment (Board) have jurisdiction over the premises?

II. Assuming (I) is answered in the negative, what is the scope of federal jurisdiction absent diversity of citizenship?

III. Has a federal cause of action been properly pleaded?

I

[2] The initial inquiry pertaining to jurisdiction of the Board is resolved by Conley v. Gibson.[4] There the Supreme Court precisely stated:[5]

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[3] 3 Cir., 1958, 256 F. 2d 745, 747.

> "* * * We pointed out that other exceptional circumstances of unavailability of the first judge would be if he had died or resigned; it was obvious in these situations that if the petition for reconsideration were to be heard at all, it would have to be by another judge."

It is important to note that no order was entered by Judge Leahy.

[4] Note 2, supra. See also Hargrove v. Brotherhood of Locomotive Engineers, D.C. 1953, 116 F. Supp. 3; Brotherhood of Railroad Trainmen v. Luckie, Tex. Civ. App. 1955, 286 S.W. 2d 712; Rose, The Railway Labor Act and the Jurisdiction of the Courts, 8 Lab. L.J. 9 (1957).

[5] 1957, 355 U.S. 41, 44, 78 S. Ct. 99, 101, 2 L. Ed. 2d 80. § 3 First (i) of the Railway Labor Act (45 U.S.C.A. § 153) has no application to carriers by air (Title II, § 201, 45 U.S.C.A. § 181), however, the identical language herein pertinent is found in Title II, § 204, first par. (45 U.S.C.A. § 184):

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances,

"We hold that it was error for the courts below to dismiss the complaint for lack of jurisdiction. They took the position that § 3 First (i) of the Railway Labor Act conferred exclusive jurisdiction on the Adjustment Board because the case, in their view, involved the interpretation and application of the collective bargaining agreement. But § 3 First (i) by its own terms applies only to 'disputes between an employee or group of employees and a carrier or carriers.' This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining."

Although plaintiff's complaint leaves much to be desired, it is clearly discernible that plaintiff's controversy is with his bargaining agent and not employer, notwithstanding that the employer is joined in the action to accord complete relief. The series of events noted in Judge Leahy's opinion disclose that the Board heard the case and rendered its verdict prior to Brady's dismissal.[6] Thus the Board

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or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes."

Thus it is apparent that the Conley construction of § 3 First (i) Title I has similar application to Title II § 204 ¶ 1 (45 U.S.C.A. § 184).

[6] "* * * On May 14, 1956, the Board decided adversely to Brady. On May 15, 1956, he was discharged from employment by TWA pursuant to the collective bargaining agreement between TWA and IAM which required good standing membership in the union as a condition of employment." 156 F. Supp. 82, 83.

could only have determined Brady's claim vis-a-vis the Brotherhood.[7]

[3] The fact that the dispute might encompass construction of the collective bargaining agreement is deemed entirely irrelevant for unless the controversy is between employee and employer the Board is simply without jurisdiction[8] and no agreement of the parties can extend its authority.[9]

The court in resolving this issue is not unmindful of the caveat noted in United Railroad Operating Crafts v. Wyer, namely, " * * * it is a fantastic thought that every employee who is discharged under a union shop agreement can run to Court about it."[10] This argument was effectively rebutted in 8 Lab.L.J. at page 69:

> " * * * The district court's (Wyer Court) indifference to the rights of the workers is shocking for it

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[7] See 8 Lab. L.J. at page 59:

> "However, if it is the situation where a hearing shows to the employer's satisfaction that the employee is not a member of the union, and the employer acquiesces in the union's demand, the dispute is not between the employee and the carrier, but between the employee and the union which is disputing his membership and pressing for the discharge. The union shop contract is solely for the advantage of the union and, in all probability, the employer would do nothing about discharging the allegedly delinquent employee until prodded by the union."

[8] 45 U.S.C.A. § 184: "The disputes between an employee or group of employees and a carrier or carriers by air * * *."

[9] "The authority or jurisdiction of the System Board is statutory, 45 U.S.C.A. § 184. It cannot be extended by agreement of the parties, for it is not a private board of arbitration." American Airlines v. Air Line Pilots Ass'n, D.C.E.D.N.Y. 1950, 91 F. Supp. 629, 632.

[10] United Railroad Operating Crafts v. Wyer. D.C.S.D.N.Y. 1953, 115 F. Supp. 359, 365.

> further said that 'it is a fantastic thought that every employee who is discharged under a union shop agreement can run to court about it.'
>
> "If it is a violation of the statute, why is it fantastic? Since when have the courts become so much more important than the citizens whose rights they must redress? Has the court become callous as to the worker's rights? Possibly these cases will make the reader wonder." (Parenthesis supplied.)

Nor is the court impervious to the advantages derived from having expertise and uniformity in the resolution of labor matters especially where the determination involves future conduct.[11] It is not thought, however, that denial of Board jurisdiction in the instant proceeding will tend to foment labor strife.[12]

Of the policy to be served the most persuasive argument is that which attacks the Board under the factual setting herein presented for the inherent bias engendered by its composition of members representing exclusively management and union. Article XII(b) of the TWA-IAM collective bargaining agreement provides:

> "The System Board of Adjustment shall consist of four (4) members, two (2) selected by the Company and two (2) selected by the Union."

It is simply repugnant to our standards of fundamental fairness and totally unrealistic to require an employee to submit a dispute he has with his bargaining agent for final determination to persons selected by and represent-

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[11] Slocum v. Delaware, L. & W. R. Co., 1950, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795. Alabaugh v. Baltimore & Ohio R. Co., 4 Cir., 1955, 222 F. 2d 861.

[12] Note 11, supra.

ing the bargaining agent. The decisional law and the legal literature are replete with condemnation of this practice.[13]

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[13] " • • • Indeed, it might be difficult to find a constitutional basis for relegating this controversy to the Railway Adjustment Board as contended by defendants, and such procedure appears particularly abhorrent when it is considered that the defendants named herein participate in making the selections of membership on the Board, who would pass upon the validity of their acts charged to be in disregard of the trust imposed upon them." Hargrove v. Brotherhood of Locomotive Engineers, D.C. 1953, 116 F. Supp. 3, 9.

"• • • We can only answer that in that event there is a public interest in the impartial protection of any rights granted by an Act of Congress that transcends the immunity of labor disputes from all surveillance by a court of law." Rychlik v. Pennsylvania R. Co., 2 Cir., 1956, 229 F. 2d 171, 175, reversed on other grounds, 1957, 352 U.S. 480, 77 S. Ct. 421, 1 L. Ed. 2d 480.

In Dr. Bonham's Case, 8 Co. Rep. 114a, 2 Brownl. 255, 77 Eng. Rep. 647 (C.P. 1610), the defendant was fined by the President and Censors of the Royal College of Physicians, pursuant to a statute, for practicing medicine without a proper license. The statute gave half the fine to the Royal College of Physicians. In holding this fine invalid Lord Coke said:

> " • • • The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem suae rei esse judicem*; and one cannot be Judge and attorney for any of the parties, • • •. And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void; • • • •."

See also Steele v. Louisville & Nashville R. Co., 1944, 323 U.S. 192, 65 S. Ct. 226, 89 L.Ed. 173; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 1944, 323 U.S. 210, 65 S. Ct. 235, 89 L. Ed. 187; Tumey v. State of Ohio, 1927, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749; Edwards v. Capital Airlines, 1949, 84 U.S.

II and III

[4] Unfortunately, concluding that the Board lacked authority to determine Brady's claim does not materially advance the jurisdictional inquiry for plaintiff seeks more than simply upsetting the Board's judgment.[14] Since diversity of citizenship is lacking the additional relief requested can only be accorded in this forum if a cause of action correctly invoking 28 U.S.C.A. § 1331 or § 1337 has been asserted.

The claim as it now reads, resolving all doubts in favor of the pleader, is in need of amendment for it is seriously

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App. D.C. 346, 176 F. 2d 755, certiorari denied 338 U.S. 885, 70 S. Ct. 186, 188, 94 L. Ed. 543; Brotherhood of Railroad Trainmen v. Luckie, Tex. Civ. App. 1955, 286 S.W. 2d 712; Rose, Railway Labor Act and Jurisdiction of the Courts, 8 Lab. L.J. 9 (1957); 40 Harv. L. Rev. 30 (1926).

[14] Complaint, pp. 6-7:

"Wherefore, plaintiff seeks the following relief:

"I. An order of this Court reversing the decision of the SBA, dated May 14, 1956.

"II. An order directing TWA to reinstate Brady as an employee with payment to him of all wages, overtime pay and vacation pay since May 15, 1956, with reinstatement of Brady to all other benefits he held as an employee of TWA including the $15,000.00 life insurance policy, the sickness and benefit policy, credit union privileges, retirement benefits and his seniority status retroactive to October 1, 1946 undiminished by the time since May 15, 1956.

"III. A judgment against IAM and/or TWA for damages for the humiliation and embarrassment suffered by Brady by reason of his illegal discharge.

"IV. A judgment for damages suffered by Brady by reason of the discharge without just cause by TWA.

"V. The allowance of a reasonable attorney's fee which shall be taxed and collected as a part of the costs of this suit.

"VI. Such other, further and different relief as the Court may deem just and proper in the premises."

questioned whether little more than an action sounding ex delicto or ex contractu has been formulated.[15] At oral argument plaintiff expressly requested permission to assert by amended complaint conduct which would set forth a cause within the purview of Conley.[16]

The court subscribes to plaintiff's contention that Conley v. Gibson[17] should not be limited to its facts but encompasses all forms of discrimination whether it be racial or not. The case law which has attempted to limit redress in federal courts to racial discrimination[18] is less persuasive to this court than the decisions and literature which oppose the placing of an arbitrary restriction.[19] There is no justifiable reason without invoking constitutional mandates to so limit federal relief where predicated solely on a federal statute.[20] In Hargrove v. Brotherhood of Loco-

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[15] Brock v. Brotherhood of Sleeping Car Porters, D.C.W.D.La. 1955, 129 F.Supp. 849.

[16] Note 2, *supra*.

[17] Note 2, *supra*.

[18] Alabaugh v. Baltimore & Ohio R. Co., 4 Cir., 1955, 222 F.2d 861; Spires v. Southern Ry. Co., 4 Cir., 1953, 204 F.2d 453; Colbert v. Brotherhood of Railroad Trainmen, 9 Cir., 1953, 206 F.2d 9, certiorari denied, 1954, 346 U.S. 931, 74 S.Ct. 320, 98 L.Ed. 422.

[19] Ford Motor Co. v. Huffman, 1953, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; Mount v. Grand International Brotherhood of Locomotive Engineers, 6 Cir., 1955, 226 F.2d 604, certiorari denied, 1956, 350 U.S. 967, 76 S.Ct. 436, 100 L.Ed. 839; Hargrove v. Brotherhood of Locomotive Engineers, D.C.1953, 116 F.Supp. 3; 8 Lab.L.J. 9 (1957); see also dissenting opinion in Brotherhood of Railroad Trainmen v. Howard, 1052, 343 U.S. 768, at page 776, 72 S.Ct. 1022, at page 1026, 96 L.Ed. 1283.

> "* * * It would have been the same if the Brotherhood had discriminated against him on some other ground, unrelated to race. It was the Brotherhood's duty 'to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent.'"

[20] Steele v. Louisville & Nashville R. Co., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173.

motive Engineers the language of Judge Pine is particularly appropriate and is in the court's estimation, a complete answer to any attempt to restrict court supervision of the RLA to racial discrimination: [21]

> "Although the Steele and related cases involved racial discrimination, an analysis of the opinions makes it clear that jurisdiction of the courts was not dependent on that element exclusively, but related to their power to determine whether or not the statutory duty to represent all of the employees equally had been met. Compare Ford Motor Co. v. Huffman, 345 U.S. 330 [73 S.Ct. 681, 97 L.Ed. 1048] where no racial question was involved."

Further the court is of the opinion that the authority cited by defendants for the proposition that the bargaining agent's responsibilty is merely to refrain from executing agreements unlawful on their face, in terms or effect[22] directly conflicts with the language of Conley stated below: [23]

> "* * * A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory as against some members of the bargaining unit."

Thus little weight and consideration have been afforded these decisions for it is fair to infer from the aforemen-

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[21] D.C., 116 F.Supp. 3, 9. See also discussion of the Hargrove decision in Brotherhood of Railroad Trainmen v. Luckie, Tex.Civ. App.1955, 286 S.W.2d 712, 716.

[22] Hettenbaugh v. Airline Pilots Ass'n International 5 Cir., 1951, 189 F.2d 319; United R.R. Operating Crafts v. Northern Pacific Ry. Co., 9 Cir., 1953, 208 F.2d 135, certiorari denied 347 U.S. 929, 74 S.Ct. 529, 98 L.Ed. 1081.

[23] 355 U.S. 41, 46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80.

tioned quotation that discriminatory practices in administering the bargaining agreement are federally condemned.[24]

Accordingly, plaintiff is granted leave to amend pursuant to the course indicated at oral argument. TWA will be retained as a party defendant as a precautionary measure to insure plaintiff complete relief in the event he sustains his burden.[25] In view of the foregoing, there is no substance to defendant TWA's contention that the complaint is deficient for non-joinder of the System Board of Adjustment.

An order may be submitted.

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[24] Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; see also Richardson v. Texas & New Orleans R. Co., 5 Cir., 1957, 242 F.2d 230.

[25] Richardson v. Texas & New Orleans R. Co., 5 Cir., 1957, 242 F.2d 230. Article XXVI (p) of the TWA-IAM agreement is further reason for not dismissing TWA as a party defendant:

> "The Union shall indemnify and save the Company harmless against all forms of liability that shall arise out of or by reason of action taken by the Company, which action was requested by the Union under the provisions of this Article (Union Security)." (Parenthesis supplied).

Vincent P. Brady, *Plaintiff,*

v.

Trans World Airlines, Inc., a corporation of the State of Delaware, and The International Association of Machinists, an unincorporated association, *Defendants.*

Civ. A. No. 1884.

United States District Court
D. Delaware.

June 10, 1959—174 F. Supp. 360

* * * * * * * * * * *

CALEB M. WRIGHT, Chief Judge.

This matter is before the court on defendant, The International Association of Machinists' (IAM) motion to dismiss the Second Amended Complaint "on the grounds that (1) the Court lacks jurisdiction over the subject-matter of the Complaint, as amended; and (2) the Complaint, as amended, fails to state a claim upon which relief can be granted." Diversity of citizenship does not exist.

Plaintiff's essential allegations of fact are:[1]

> "Brady was *not* delinquent in the payment of his dues. He tendered his dues in time to avoid being held delinquent by the IAM. His tender of dues was refused. The IAM's refusal to accept his dues is unexplainable except on the basis that it wanted to

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[1] Plaintiff's Brief in Opposition to Motion to Dismiss Second Amended Complaint, pp. 5-6.

"* * * Brady brings this action pursuant to the provisions of the United States Code, Title 45, Chapter 8, and more particularly Title II, Section 201 and Title I, Section 2 of the Railway Labor Act, to the extent the provisions of Title I, Section 2 are made applicable by Title II, Section 201, the aforesaid sections also being known as 45 U.S.C. [§§] 181 and 152, and pursuant to the provisions of 28 U.S.C. Section 1331 and 1337." Second Amended Complaint, par. 18.

be rid of Brady. Despite Brady's timely tender of dues, the IAM before the SBA and previously in this Court claimed that Brady was delinquent. * * * The discrimination against Brady was the fact that the IAM refused to accept tender of his dues which was not the attitude the IAM took with respect to other members of Brady's Local 1776. Not content with discriminating against Brady by refusing to accept his dues, the IAM thereafter 'pulled out all stops' in an effort to have Brady discharged. The tack the IAM took was to claim that he had not paid dues (misrepresenting the fact). The action which the IAM took against Brady under its claim that he had not paid dues was action which the union did not take against other members of Local 1776, who were, in fact, delinquent in the payment of their dues. The purpose of Brady's allegation (and what he believes the proof in this case will show) is that the IAM made out a fictitious case against Brady using a 'test', which test the IAM itself was unwilling to apply to other members of the IAM Local. Thus, the discrimination."

A perusal of the aforementioned contentions indicates that plaintiff sets forth two distinct claims, namely:

(1) Plaintiff was discharged in violation of 45 U.S.C.A. § 152.[2]

(2) The Brotherhood's discriminatory actions in causing plaintiff's discharge constitute a breach of the bargaining representative's duty under the Railway Labor Act to represent all members of the craft fairly without discrimination.[3]

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[2] This section is made applicable to Carriers by Air, 45 U.S.C.A. § 181.

[3] Conley v. Gibson, 1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; Steel v. Louisville & Nashville R. Co., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173; Tunstall v. Brotherhood of Locomotive Firemen

[1] The court holds plaintiff's averments re discrimination are sufficient to bring him within the purview of this court's adjudication filed October 28, 1958.[4]

[2] The bargaining representative's statutory duty "to represent fairly and without hostile discrimination all of the employees in the bargaining unit", and "not to draw 'irrelevant and invidious' distinctions among those it represents"[5] clearly proscribes arbitrary invocations of union security provisions to reprimand the membership.[6] If inaction be interdicted[7] manifestly affirmative discriminatory conduct cannot be countenanced.

[3] Plaintiff's claim that he was discharged in violation of 45 U.S.C.A. § 152, particularly Section 152, Eleventh (a), raises a serious question of statutory construction. This provision in pertinent part provides:

& Enginemen, 1944, 323 U.S. 210, 65 S. Ct. 235, 89 L.Ed. 187. Brady v. TWA, D.C.Del.1958, 167 F.Supp. 469; Cherico v. Brotherhood of Railroad Trainmen. D.C.S.D.N.Y.1958. 167 F.Supp. 635; Vol. 2 U.S.Code Congressional Service, 81st Congress, 2d Session 1950, p. 4322: "Your committee also desires to make it clear that nothing in this bill [S. 3295] is intended to modify in any way the requirement that the authorized bargaining representative shall represent all the employees in the craft or class, including non-union employees as well as members of the union, fairly, equitably, and in good faith. (See Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 65 S. Ct. 226, 89 L.Ed. 173, and Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187)."

[4] Brady v. TWA, *supra.*

[5] Conley v. Gibson, 1957, 355 U.S. 41, 46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80.

[6] "If the unions are to represent all of its members equitably, it breaches its duty if it discriminates against an individual as well as against a class or a recognized minority group." Cherico v. Brotherhood of Railroad Trainmen, D.C.S.D.N.Y.1958, 167 F.Supp. 625, 637.

[7] Note 5, *supra.*

"Eleventh. Notwithstanding any other provisions of this chapter, * * * any carrier or carriers * * * and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

Defendant submits that the proviso language of the enactment merely declares illegal agreements which, on their face, do not conform to the statute. Thus, under defendant IAM's view, so long as the collective bargaining agreement is couched in terms of the Act, conduct under any circumstance, cannot give rise to a federally cognizable claim.

Although the proviso does appear to speak of "no agreement shall" to adopt defendant IAM's construction and so limit its application, would render the provision impotent. The Conley court rejected the identical argument where it was urged as limiting the duty of the bargaining agent to

refrain from negotiating agreements discriminatory in terms and/or effect. Mr. Justice Black cogently observed: [8]

> "* * * A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit." [355 U.S. 41, 78 S.Ct. 102.]

The legislative history makes it crystal clear that if an employee be expelled from membership for any reason other "than his failure to tender the uniformly required periodic dues, initiation fees, and assessments, he cannot be required to relinquish his job because of his failure to join or remain a member of a labor organization." [9] Defendant asserts that the court is precluded from resorting to statements evidencing the policy bottoming the proviso without demonstrating that the statutory language is ambiguous.

45 U.S.C.A. § 152, Eleven (a) not unlike other provisions of the Railway Labor Act is incapable of literal application.[10] For instance, the section as worded suggests the

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[8] Note 5, *supra.*

[9] Vol. 2 U.S.Code Congressional Service, 81st Congress, 2d Session 1950, p. 4322.

[10] Pennsylvania R. Co. v. Rychlik, 1957, 352 U.S. 480, 488-489, 77 S.Ct. 421, 425, 1 L.Ed.2d 480:

> "At first glance the language of Section 2, Eleventh (c) would appear to be disarmingly clear: union-shop contracts are satisfied if the employee belongs to any union which happens to be national in scope and organized in accordance with the Act. And if that be its meaning we would then have to deal with the questions reached by the Court of Appeals. However, as so often happens, when the language of the statute is read, not in a vacuum, but in the light of the policies this Section was intended to serve, it becomes clear that the purpose of Congress was not, as respondent contends, to give employees in the railroad industry any blanket right to join

anomalous result that a member may not be discharged for failing to maintain membership but only for failing to acquire membership.[11] Manifestly the drafters could not have intended the aforementioned construction; neither could they have purposed the interpretation placed upon the second proviso by defendant.[12]

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unions other than the authorized bargaining representative, or to help dissident or arising new unions recruit new members. Rather, the sole aim of the provision was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members employment security, even if a member should be working temporarily in a craft for which another union is the bargaining representative. * * *"

[11] Compare 45 U.S.C.A. § 152 Eleventh (a):

"(a) to make agreements, requiring, *as a condition of continued employment,* that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class * * *." (Emphasis supplied.)

with first clause of TWA-IAM agreement, Article XXVI:

"Each employee now or hereafter employed in any work covered by this Agreement shall, as a condition of continued employment in such work, within sixty (60) days following the beginning of such employment or the effective date of this Article, whichever is later, become a member of, and thereafter maintain *membership in good standing* * * *." (Emphasis supplied.)

[12] United States v. Shirley, 359 U.S. 255, 79 S.Ct. 746, 749, 3 L.Ed.2d 789:

"Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.' United States v. Whitridge, 197 U.S. 135, 143, 25 S.Ct. 406, 408, 49 L.Ed. 696. This is so because the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words.

The 1951 amendment permitting carriers and employee representatives to bargain for union security, discloses that the sole requirement the bargaining agent could extract from its members as a condition of continued employment was the tender of "periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." [13]

[4, 5] An employee whose discharge is precipitated by a union covered under the provisions of the Railway Labor Act for reasons other than enunciated in the statute, absent Congressional preemption,[14] may have recourse to a federal court. To hold otherwise would be a perversion of the general statutory scheme and defeat entirely the declared purposes of Congress.[15]

See United States v. Wurzbach, 280 U.S. 396, 399, 50 S.Ct. 167, 74 L.Ed. 508. Statutory meaning, it is to be remembered, is more to be felt than demonstrated, see United States v. Johnson, 221 U.S. 488, 496, 31 S.Ct. 627, 55 L.Ed. 823, or, as Judge Learned Hand has somewhere put it, the art of interpretation is 'the proliferation of purpose.' * * *"

[13] 45 U.S.C.A. § 152, Eleventh (a).

[14] The instant proceeding is not one in which a System Board of Adjustment created pursuant to 45 U.S.C.A. § 184 has jurisdiction. Brady v. TWA, D.C.Del.1958, 167 F.Supp. 469. See also Felter v. Southern Pacific Co., 1959, 359 U.S. 326, 79 S.Ct. 847, 3 L.Ed.2d 854; Conley v. Gibson, supra; Cunningham v. Erie R. Co., 2 Cir., 1959, 266 F.2d 411.

[15] Vol. 2, U.S.Code Congressional Service, 81st Congress 2d Session 1950, pp. 4321-4322:

"* * * The proposal was made by Senator Lehman that your committee's intention be made clear that such employees were not to be deprived of their employment as a result of the exercise of the right extended by this bill. Your committee desires to make it clear that the proviso clauses in paragraph eleventh (a) are designed to protect such employees; thus if an employee is denied membership or is eligible for membership only on terms and conditions not generally applicable to other mem-

Prior to the 1951 amendment an employee could not be discharged at the request of the certified bargaining agent for failing to retain union membership.[16] No language in 45 U.S.C.A. § 152, Eleventh (a) permitting a carefully circumscribed form of union security indicates that Congress intended to deprive the federal courts of actions based upon allegations that a union member was certified for discharge by his bargaining agent, notwithstanding he had fulfilled his financial obligation to the brotherhood.

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bers, he cannot be requested to give up his job because of his failure to join a labor organization. Furthermore, if membership is denied or if an employee is expelled from membership for any reason other than his failure to tender the uniformly required periodic dues, initiation fees, and assessments, he cannot be required to relinquish his job because of his failure to join or remain a member of a labor organization. * * *"

"* * * It is the view of your committee that the terms of S. 3295 are substantially the same as those of the Labor-Management Relations Act as they have been administered and that such differences as exist are warranted either by experience or by special conditions existing among employees of our railroads and airlines." *Vol. 2 U.S. Congressional Service, 81st* Congress, 2d Session 1950, p. 4321.

Compare 29 U.S.C.A. § 158(a) (3):

"* * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization, * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

[16] Vol. 2 U.S. Congressional Service, 81st Cong., 2d Sess., pp. 4319-4321; 45 U.S.C.A. § 152, Fifth. See also Pennsylvania R. Co. v. Rychlik, 1957, 352 U.S. 480, 489, 77 S.Ct. 421, 1 L.Ed.2d 480. "* * * It is true that at the time of its passage in 1951 Subsection Fifth of § 152 made it unlawful for a railway to require an employee to join any union as a condition of employment, and we may assume, arguendo, that that subsection still forbids a 'closed shop.' * * *" Otten v. Baltimore & Ohio R. Co., 2 Cir., 1953, 205 F.2d 58, 60.

There remains for consideration a third source of federal jurisdiction, namely, the union security provision of the collective bargaining agreement violates the second proviso of 45 U.S.C.A. § 152, Eleventh (a). The contractual provision in pertinent part provides:[17]

> "(a) Each employee now or hereafter employed in any work covered by this agreement shall, as a condition of continued employment in such work, within sixty (60) days following the beginning of such employment or the effective date of this Article, whichever is later, become a member of, and thereafter maintain membership in good standing (as herein defined), in the Union, except as provided otherwise herein. Such condition shall not apply * * * with respect to any employee to whom membership is denied or terminated for any reason other than the failure of the employee to tender the dues uniformly required of other members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership.
>
> "For the purpose of this Article, 'membership in good standing in the Union' shall consist of the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month, which are uniformly required of members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership.
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> * * * * * * * * *
>
> "(e) When an employee becomes delinquent by not meeting the requirements of (a) above for 'membership in good standing in the Union', the following procedure shall be observed:

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[17] TWA-IAM agreement, effective March 11, 1955, Article XXVI, pp. 62, 63, 67.

"(1) The General Chairman of the Union shall notify the employee by registered letter, return receipt requested, copy to the Company's Vice President of Industrial Relations, that the employee is delinquent in the payment of dues as specified herein and accordingly is subject to discharge as an employee of the Company. * * *

* * * * * * * * * *

"(n) Whenever the term dues is referred to in this Article, such use of the word 'dues' shall include initiation or reinstatement fees, periodic dues, and assessments (not including fines and penalties), * * *."

The definition of membership in good standing set forth in the above-quoted Article as "the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month" does not seem to conform with Article E, Section 14 of the IAM constitution which in essence provides for a three month grace period.[18] At one stage of the proceedings counsel for defendant conceded the variance:[19]

"Now, the way he gets that is this: *The union shop agreement itself provides that a member shall be in good standing if he is not delinquent for more than one month. In other words, the union shop agreement provision is stronger than what is in the union laws.* People can be members of the union in places where they do not have a union shop, and they would not be affected the same way. But it says one month. Then it has a provision in it that says that that delinquency of one month can be met up until the end of the next calendar month.

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[18] International Association of Machinists Constitution, Article E, Sec. 14.

[19] Transcript of proceedings April 21, 1958, Argument pp. 39-40.

"So as far as the wording of the union shop agreement itself is concerned—suppose the plaintiff had only been delinquent for February, he would have nearly had up until the end of March to meet his delinquency. And if that was what we were talking about, then his argument would be a good argument. However, that was not what Mr. Miller replied to him. *What Mr. Miller replied to him, which was more generous than what was in the union shop agreement, was the provisions of the union constitution which are before the court which provide that a man shall lose his good standing automatically when he is three months delinquent.* It does not make any difference whether we figure that three months on February 1 or on February 28. * * * " (Emphasis supplied.)

This matter was brought to the attention of counsel sua sponte by the court wherein after pointing out the aforementioned discrepancy the court suggested:[20]

"In view of the foregoing, does not Article XXVI (e) which prescribes the procedure for union certification for delinquency 'by not meeting the requirements of (a) above for membership in good standing in the union' raise a statutory claim? It seems to me that Article XXVI (e) would permit the discharge for a dues delinquency of but two months and since the constitution permits a three months delinquency before termination of union membership, I question whether this is not specifically contrary to the second proviso of 2 Eleventh (a):

" '*Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or *with respect to employees*

[20] Letter dated February 4, 1959.

*to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, * * * uniformly required as a condition of* acquiring or retaining membership.' (Emphasis supplied.)

"Thus, under the above construction, could there be any question but that the court has jurisdiction in the premises?

"Since this matter is raised for the first time by me, I would appreciate hearing the views of counsel at their earliest convenience."

IAM replied that counsel's previous statement was erroneous and proceeded to submit a revised construction.[21]

Plaintiff answered, "that on analysis there is no inconsistency between Article E, Section 14 of the IAM constitution and Article XXVI (a) of the TWA-IAM agreement," however, "there is considerable difference between the IAM's explanation of the consistency of the two sections and Brady's."[22]

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[21] "Upon consideration of the point raised in the Court's February 4th letter, the language of the entire Article XXVI(a), and the record of the proceedings before the System Board of Adjustment, counsel believes that he was in error in stating during the April 21st argument that there is any difference between Article XXVI (a) and Article E, Section 14 of the IAM Constitution." Supplemental Memorandum of IAM in Support of Motion to Dismiss Second Amended Complaint, p. 5, filed March 4, 1959.

[22] Supplemental Reply Brief of Vincent P. Brady, p. 3, filed April 22, 1959. But see plaintiff's letter of February 16, 1959: "Although I have not argued that the inconsistency with respect to dues between the Union Constitution and the IAM-TWA Agreement invalidates the agreement under the Federal Statute, I believe the argument is meritorious and is encompassed within the complaint as initially filed and as amended."

[6] Under the recent Supreme Court pronouncement in Felter v. Southern Pacific Co., [23] it would seem unquestionably that the validity of an agreement executed pursuant to 45 U.S.C.A. § 152, Eleventh (a) is federally cognizable, notwithstanding that the case solely presented a 45 U.S.C.A. § 152, Eleventh (b) agreement.

Particularly applicable to the present litigation is footnote 3, wherein Mr. Justice Brennan states: [24]

> "The Trainmen's position, concurred in by the company, is that this provision means that no revocation cards are to be recognized 'except those reproduced by our organization.' While this construction of the agreement is hardly an obvious one, it is the construction put on the agreement by the parties to it, the Southern Pacific and the Trainmen, and since petitioner in this suit does not question it as a matter of construction, we of course accept it here.
>
> "Since there was no question of interpretation or application of the collective agreement, but rather only one of its validity under the statute, the case is not one in which resort to the grievance and Adjustment Board machinery provided by the Railway Labor Act was required. 'This dispute involves the validity of the contract, not its meaning.' Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 774, 72 S.Ct. 1022, 1025, 96 L.Ed. 1283. Cf. Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 242-244, 70 S.Ct. 577, 578-580, 94 L.Ed. 795. The case presents an employee dispute as much, if not more, with the labor organization as with the employer. Cf. Steele v. Louisville & N. R. Co., 323 U.S. 192, 205, 65 S.Ct. 226, 233, 89 L.Ed. 173."

Unfortunately the posture of the immediate proceeding does not mirror Felter, supra, with respect to the con-

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[23] 1959, 359 U.S. 326, 79 S.Ct. 847, 850, 3 L.Ed.2d 854.

[24] Note 23, *supra*.

struction of the respective bargaining agreements. In Felter the agreement, as construed by the carrier and bargaining agent, was not questioned by the aggrieved employee.[25] Here no accord on the interpretation of Article XXVI has been reached.

In view of plaintiff's allegation that defendant violated 45 U.S.C.A. § 152, Eleventh (a), and the patently ambiguous contractual language, with one possible construction leading toward illegality, it is deemed that jurisdiction in the premises has been properly reposed in this court within the purview of Felter, supra.

Accordingly, defendant's motion to dismiss the second amended complaint is denied. The court further denies defendant's application for an interlocutory certificate pursuant to 28 U.S.C.A. § 1292(b). To place this case in proper perspective for appellate review the factual disputes should be resolved.

Submit order.

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[25] Note 23, supra.

Vincent P. Brady, *Plaintiff*,

v.

Trans World Airlines, Inc., a corporation of the State of Delaware, and the International Association of Machinists, an unincorporated association, *Defendants*.

Civ. A. No. 1884.

United States District Court

D. Delaware.

July 11, 1961—196 F. Supp. 504

* * * * * * * * * *

CALEB M. WRIGHT, Chief Judge.

Plaintiff has sued the above-named defendants for reinstatement to his job and various forms of damages. He contends his discharge by defendant TWA, purportedly based upon a valid union-shop agreement with defendant IAM, was in violation of the Railway Labor Act.[1] Plaintiff and the IAM have filed cross-motions for summary judgment.

[1] After considering the oral argument and various parts of the record, it appears this case may not be disposed of under Rule 56, 28 U.S.C.A., as construed by our Court of Appeals. In this Circuit, a District Court, in disposing of a motion for summary judgment, may not draw inferences from admitted facts, Bragen v. Hudson County News Company, 3 Cir., 1960, 278 F.2d 615; may not use supporting affidavits to overcome well-pleaded facts, Hart & Co. v. Recordgraph Corp., 3 Cir., 1948, 169 F.2d 580; and apparently may not even assume facts against the moving party, Krieger v. Ownership Corp., 3 Cir., 1959, 270 F.2d 265.

[2] In the present case, the question of whether Brady was discharged "for any reason other than the failure

[1] That statute is set out at 45 U.S.C.A. §§ 151-163, 181-188.

* * * to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." (Railway Labor Act, § 2, Eleventh), is at best one of mixed fact and law. Of a similar nature is the issue of "discrimination" on the part of the IAM. Although there are many admitted facts, there is a sharp dispute as to the inferences to be drawn therefrom, and the Court cannot say the law compels one possible inference as against another on each material issue. The area of agreed facts also appears somewhat less than counsel have presumed.

[3] Defendant IAM has moved to strike plaintiff's demand for trial by jury. Intermixed with this issue is the question of whether plaintiff, if successful on his substantive claims, might be entitled to punitive damages. If so, then his claim for a jury trial may be well-founded, for a court of equity, in the absence of express statutory provisions, is without authority to assess punitive damages. William Whitman Co. v. Universal Oil Products Co., D.C. D.Del. 1954, 125 F.Supp. 137. This latter problem will be dealt with first.

[4] Plaintiff relies on two separate and distinct statutory provisions. The first is based on § 2, Eleventh, of the Railway Labor Act, a 1951 enactment in the nature of a proviso "intended to relax the prohibitions contained in paragraphs fourth and fifth of Section 2 * * * against all forms of union security agreements. * * *"[2] S.Rep. No.

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[2] The Court's jurisdiction over this phase of the action is clear, for § 2, Fourth, Fifth, have been authoritatively construed to be enforceable by the courts. Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 1930, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034; Virginian Railway Co. v. System Federation No. 40, 1937, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; Railroad Employees' Co-op. Association v. Atlanta B. & C. R. Co., D.C.D.Ga. 1938, 22 F. Supp. 510. Since § 2, Eleventh, was intended solely to limit the effect of those sections, its interpretation and enforcement is likewise left to the courts.

2262, 81st Cong., 2nd Sess. (1950). The Senate Report further stated, "[T]he terms of [§ 2, Eleventh] are substantially the same as those of the Labor-Management Relations Act as they have been administered. * * *" Violations of the corresponding provisions in the Taft-Hartley Act, 29 U.S.C.A. § 158(a) (3), (b) (2), cannot lead to punitive damages. Local 60, United Brotherhood of Carpenters, etc. v. N.L.R.B., 1961, 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1. Moreover, the regulation of the economic relations between labor and management is an exceedingly delicate matter, and this Court is unwilling to employ the crude device of punitive damages as a remedy in causes founded on a detailed and pervasive federal statutory scheme without express authorization from Congress. See United Mine Workers of America v. Patton, 4 Cir., 1954, 211 F.2d 742, 47 A.L.R. 2d 850.

[5] Plaintiff's second statutory basis for this action is the duty of a union to bargain fairly on behalf of those it represents and not to act with "hostile discrimination" towards members of the bargaining unit. Steele v. Louisville & N. R. Co., 1944, 323 U.S. 192, 203, 65 S.Ct. 226, 89 L.Ed. 173. Although the rationale that express statutory authority is necessary to award punitive damages as a remedy for violations of a federal statute is somewhat inapposite where the statutory duty itself is only implicit, the Court does not believe the Steele doctrine authorizes such relief.[3] No case has yet gone so far.[4] Moreover, the very threat of punitive damages, as a remedy for violations of a duty which in effect limits the scope of collective bargaining between labor and management, may have un-

[3] Full equitable relief in the form of injunctions is obtainable to remedy Steele violations in spite of the provisions of the Norris-La Guardia Act, 29 U.S.C.A. §§ 101-115. Graham v. Brotherhood of Locomotive Firemen, 1949, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22.

[4] The cases cited by plaintiff all involve state law and are, therefore, inapposite here.

foreseeable effects upon the institution of free collective bargaining itself.[5] In this situation, the fact that the duty itself has been read into the Act by the courts may well be cause to limit the relief obtainable to equitable remedies and compensatory damages. Because of this danger, the duty itself has been restricted by the courts and gives only limited protection.[6] Under these circumstances, the Court does not believe punitive damages may be recovered in actions based upon the Steele doctrine.

[6] The complaint also asserts a common law cause of action, based on state law, either of wrongful discharge (against TWA) or malicious interference with an employment relationship (against the IAM).[7] The issue of punitive damages need not be reached here, for the Court finds § 2, Eleventh, of the Railway Labor Act has deprived the states of their power to regulate discharges under union security agreements within the scope of that statute. Unlike the Taft-Hartley Act,[8] the union security provisions

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[5] See the dissent of Mr. Chief Justice Warren in United Automobile, etc., Workers of America v. Russell, 1958, 356 U.S. 634, 652, 78 S.Ct. 932, 2 L.Ed.2d 1030. The majority held there that since the state had power to act, it could award all damages allowed by state substantive law. The dissent, however, assumes some pertinency when, as here, we are dealing solely with federal law.

[6] See Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1339-43 (1958). Most, if not all, of the successful cases based upon Steele have involved racial discrimination. It seems clear, however, the doctrine is not limited solely to this form of discrimination.

[7] Absent other factors, the Court might have jurisdiction of these causes under Bell v. Hood, 1946, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939; Hurn v. Oursler, 1933, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148.

[8] 29 U.S.C.A. § 164(b), specifically allows prohibitory state law to control over federal in determining the validity of union security agreements under the Taft-Hartley Act.

of the Railway Labor Act are to be effective "notwithstanding any * * * law * * * of any state * * *." Section 2, Eleventh. In view of the detailed and pervasive nature of § 2, Eleventh, and the explicit language contained therein, the Court finds its provisions, in conjunction with § 2, Fourth, Fifth, state in full the rights and duties of employers, unions, and individual employers under union security agreements in the railroad industry. State law can have no application in such a situation.[9]

This holding is in no way a ruling upon the vitality of state law in discharge cases not involving union security agreements. See e. g. Moore v. Illinois Central R. Co., 1941, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089. Congress has chosen to treat union security problems under the Railway Labor Act in a manner different from that applicable to other grievances. Section 2, Fourth, Fifth, have been traditionally enforced by the courts,[10] and the scope of the limited dispensation from their harsh effect afforded by § 2, Eleventh, must likewise be left to the judiciary.[11] Other problems, such as layoffs by seniority, discharges for inefficiency and the like, not coming within § 2, Fourth,

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[9] To hold otherwise would endanger the federal scheme, whether the state law be more liberal or more strict in dealing with union security agreements. The Supreme Court has found Congress has filled the field and deprived states of their power to act in situations far less strong than this. See Commonwealth of Pennsylvania v. Nelson, 1956, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640.

[10] See note 2, supra.

[11] There is an exception to this rule. Section 2, Eleventh (c), in order to prevent compulsory dual unionism, allows its requirements to be satisfied by membership in a railroad union "national in scope" and qualified under § 3, First, as an elector of the union representatives on the National Railroad Adjustment Board. Section 3, First (f), leaves the determination as to qualification to a special board rather than the courts. Pennsylvania R. Co. v. Rychlik, 1957, 352 U.S. 480, 77 S.Ct. 421, 1 L.Ed.2d 480. This is not an issue in the present case.

Fifth, and, therefore, outside § 2, Eleventh, cannot be within the scope of this ruling.

[7] In view of the foregoing, plaintiff's demand for a jury trial must be stricken. Except for punitive damages, the main relief sought, reinstatement, is equitable in nature, the other requests for monetary compensation, such as back pay, being incidental to this. See Steffen v. Farmers Elevator Service Co., D.C.N.D. Iowa, 1952, 109 F.Supp. 16.

[8] A second reason for striking the demand for a jury trial is that the statutory mandates relied upon do not embrace actions known at common law and are thus outside the scope of the Seventh Amendment. See Steffen v. Farmers Elevator Service Co., supra. Section 2, Fourth, Fifth, protecting the employment relation from discrimination aimed at union activity or inactivity, with the limited exception granted by § 2, Eleventh, establish rights and duties "unknown to the common law." N. L. R. B. v. Jones & Laughlin Steel Corp., 1937, 301 U.S. 1, 48, 57 S.Ct. 615, 629, 81 L.Ed. 893. Likewise, the Steele doctrine, imposed because Congress saw "fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents * * *," limits the power of unions much as the equal protection clause of the United States Constitution, Amend. 14, limits state action. Steele v. Louisville & N. R. Co., supra, 323 U.S. at page 202, 65 S.Ct. at page 232. An action based on this doctrine clearly is unknown to the common law. The demand for trial by jury will be stricken. Other issues raised by counsel may be conveniently disposed of at trial.

Submit order.

* * * * * * * * * *

District Court Opinion

May 3, 1962. (Unreported)

Gentlemen:

My decision on the defendants' motion to dismiss the plaintiff's amendment to the second amended complaint filed in the above-captioned action should have been forthcoming several months ago. Due to an oversight on my part, after considering the matter, I neglected to inform counsel of my ultimate conclusion.

The motion of the defendant to dismiss is denied. However, in accordance with Rule 12 (f), F.R. Civ. P., the court on its own motion will order stricken plaintiff's amendment to the second amended complaint.

The thrust of defendants' argument in support of the motion to dismiss is that the pleading is redundant. If defendants' argument encompasses more than this, the court is not disposed to render an adjudication on the merits of the controversy in the present posture of the litigation. The court agrees, however, that the amendment to the second amended complaint simply realleges, in substance, factual matter contained in the prior pleadings. Moreover, the legal conclusion contained in the most recent pleading is simply a refinement of the previously pleaded broad conclusion that the conduct of the defendant union violated Section 152 (a) Eleventh of the Railway Labor Act. The Court has concluded, therefore, that the amendment to the second amended complaint is in all respects redundant in view of the prior pleadings. Without the amendment, the court is of the opinion all issues of law and fact may be fully litigated and determined. The court will sign an order in accordance herewith.

This case is now at issue and counsel will bring the matter on for trial in accordance with the rules of this Court.

CALEB M. WRIGHT
Chief Judge

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Vincent P. Brady, *Plaintiff*,

v.

Trans World Airlines, Inc., a corporation of the State of Delaware, and the International Association of Machinists, an unincorporated association, *Defendants*.

Civ. A. No. 1884.

United States District Court

D. Delaware.

Nov. 4, 1963—223 F. Supp. 361

* * * * * * * * * *

CALEB M. WRIGHT, Chief Judge.

This is an action by an employee alleging that he was discharged from his job in violation of the Railway Labor Act.[1] The complaint seeks reinstatement and damages. Plaintiff, Vincent P. Brady, was and is a resident of Delaware. Defendant, Trans World Airlines, Inc., (TWA) is a Delaware corporation. Defendant, International Association of Machinists (IAM) is an unincorporated Labor Union. There is no diversity of citizenship. Damages have been severed from liability and this opinion deals only with the latter question.

In 1951, Brady was hired by TWA and worked for the company at the Philedelphia International Airport until May of 1956, the date of the alleged wrongful discharge.[2] He was a member of the IAM Local Lodge 1776 during this period. At a meeting of the Local on November 2, 1955, the membership voted to increase dues for workers in Brady's classification from $3.00 to $3.25.[3] Plaintiff

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[1] The Section relied upon is 45 U.S.C. § 152, particularly Section 152, Eleventh (a), of the Railway Labor Act. This Section is made applicable to carriers by air, 45 U.S.C. § 181.

[2] Brady also worked for TWA from October 1, 1946 to May, 1949.

[3] PX 25.

was not present at this meeting but at the next session appeared and challenged the legality of the dues increase.[4]

In the meantime, Gerald C. Coleman was elected financial secretary of the Local Lodge and took office early in January of 1956.[5] Upon taking office he endeavored to get all members of the Union whose dues were in arrears to pay what they owed. Coleman posted a list of delinquent members[6] and on February 15th posted another list of all members who were in arrears two or more months. These members were given ten days to pay on pain of being cited to the District Lodge. Everyone complied with the notices except plaintiff who steadfastly refused to pay or tender dues other than at the old rate of $3.00.[7] He maintained this position even when asked by a Lodge officer to tender at the new rate under protest. The only reason given by plaintiff in justification of nonpayment was the illegality of the increase. On March 3, 1956 Coleman cited the plaintiff and requested District General Chairman Miller to cancel the plaintiff's membership in the IAM.

Miller was away from headquarters when the citation was received and first became aware of Brady's delinquency on March 13, 1956.[8] Miller saw Brady at the Airport in Philadelphia at this time and spoke to him about the dues.[9] Plaintiff explained his position and Miller advised him to pay under protest and appeal through chan-

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[4] Tr. 24, 25.

[5] Tr. 202.

[6] Tr. 221.

[7] Tr. 38, 325-26.

[8] Tr. 356.

[9] Tr. 356-57.

nels.[10] Brady then received a letter dated March 13th advising him to get in good standing by paying his dues. The request asked for unpaid dues including those for the month of March.[11] On March 27th, Brady sent a check to Coleman in the amount of $10.50 for dues for December 1955, January and February 1956, but did not send the March dues as requested in the letter of March 13th.[12]

This check was returned to Brady with a letter from Coleman which stated, "this amount $10.50 is not sufficient to cover your dues and reinstatement fee."[13] The letter then demanded payment of $34.75 by April 4th to cover the reinstatement fee and three months dues. Miller, however, upon learning of the demand, decided it was in error and wrote Brady that a $25 reinstatement fee was sufficient.[14] Plaintiff then asked permission to pay dues alone but his request was refused. On May 1, 1956, Miller requested Brady's discharge under the terms of the union shop agreement with TWA. Plaintiff appealed to the System Board of Adjustment. The Board upheld his discharge.

[1] Plaintiff filed his complaint on May 10, 1957 and the case is now in the posture for final decision. Brady contends first that his discharge, committed at the behest of the Union, was prompted by the Union's hostile discrimination against him. Such conduct would be a breach of the

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[10] Tr. 384.

[11] PX 3. On March 13, 1956 Brady had not paid dues for December, January, February and March Tr. 52.

[12] Tr. 42. Brady mistakenly believed the dues increase had been $.50 rather than $.25. In attempting to pay three months dues, therefore, he sent $10.50 rather than $9.75. It is not disputed, however, that Brady's tender was intended to, and did, cover three months dues at the new rate.

[13] PX 4.

[14] PX 14.

bargaining agent's duty of fair representation and, if proven, appropriate relief would be granted by the Court. Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191 (4 Cir. 1963). Brady's second argument is that the discharge was illegal in that it did not comply with Section 2 (Eleventh) of the Railway Labor Act[15] governing union shop agreements. Because the Court finds Brady has proven facts sufficient to support recovery under this latter theory, the opinion will deal with that issue only, and no facts will be found on the hostile discrimination question.

I *Jurisdiction*

Defendant's threshold contention is that the Court lacks subject matter jurisdiction over Brady's claim since it involves application and the interpretation of Section 2 (Eleventh) of the Railway Labor Act. That provision reads in part:

> "Eleventh. Notwithstanding any other provisions of this chapter, * * * any carrier or carriers * * * and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such con-

[15] 45 U.S.C. § 152 (Eleventh). Hereafter paragraphs of 45 U.S.C. § 152 will be designated simply by their place in Section 2 of the Railway Labor Act, such as 2(First), 2(Second), etc.

dition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." 45 U.S.C. § 152 (Eleventh).

Application and interpretation of this section, it is asserted, is the sole province of the System Boards of Adjustment since particular cases arising under it may involve interpretation of union security agreements and these Boards have exclusive jurisdiction of cases "* * * growing out of grievances, or out of the interpretation or application of agreements * * *."[16] One line of cases has adopted this reasoning. E. g. Battle v. Brotherhood of Railway Clerks & Steamship Clerks, etc., 320 F.2d 742 (D.C. Cir. 1963). Another line, however, has held to the contrary and has not found the federal courts powerless to act in cases involving 2 (Eleventh). E. g. Cunningham v. Erie R. R. Company, 266 F.2d 411 (2 Cir. 1959).

[2] This Court finds jurisdiction. Section 2 (Eleventh) is not a self-contained, independent statutory provision. It is a proviso, an exception to an express prohibition of the Act beginning with the words "Notwithstanding any other provisions * * *." Prior to the enactment of this section, all forms of union security were barred by the broad provisions of Section 2 (Fourth) (Fifth)[17] which prohibited all employer conduct designed "* * * to in-

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[16] 45 U.S.C. § 184.

[17] 45 U.S.C. § 152 (Fourth) (Fifth). Jurisdiction over this matter has been upheld on these grounds in previous opinions in the case. 196 F.Supp. 504, 506 n. 2 (D.C.Del.1961).

fluence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization * * *."[18] That 2 (Eleventh) was intended by Congress to be a proviso to this prohibition is authoritatively demonstrated by the Senate Report[19] accompanying it. That Report stated, "[it] is intended to relax the prohibitions contained in paragraphs fourth and fifth of section 2 of the Railway Labor Act against all forms of union security agreements * * *." Indeed, Congress explicitly had the Taft-Hartley Act in mind,[20] and the union shop provisions of that statute are merely a proviso to the basic anti-discrimination section.[21] Only when stated loosely, therefore, can plaintiff's claim be said to rest on 2 (Eleventh). More specifically, however, his claim is that because the discharge fell outside that exempting section and is not protected by it, it violated 2 (Fourth) for it was clearly designed "to influence or coerce employees in an effort to induce them to join or remain * * * members of [a] labor organization."[22]

[3] Viewing plaintiff's claim in this manner puts the jurisdictional question in a very different light, for relevant decisions of the Supreme Court, as well as common sense, indicate that 2 (Fourth) is fully enforceable by the federal courts. In Texas & New Orleans Railroad Com-

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[18] In the absence of these prohibitions, the unions and employers would be free to agree to a closed shop, the most stringent union security agreement.

[19] S.Rep.No.2262 in Vol. 2 U.S.Code Congressional Serv. 81st Cong. 2nd Sess. 1950, pp. 4319, 4320.

[20] Ibid. That Report stated, "[T]he terms of Section 2 (Eleventh) are substantially the same as those of the Labor-Management Relations Act as they have been administered * * *."

[21] 29 U.S.C. § 158(a)(3).

[22] It is undisputed that Brady's discharge was a result of the Union's claim that he had not fulfilled his membership obligations in the Union.

pany v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, 59 S.Ct. 427, 74 L.Ed. 1034 (1930), a district court had issued an injunction restraining the company from interfering with its employees' right to select their bargaining representative freely. The complaint alleged that defendant had coerced members of the plaintiff, the Railway Clerks, to join the Association of Clerical Employees, a company dominated union. After the injunction issued the defendant proceeded to recognize the Association as the employees' exclusive bargaining representative. A contempt citation issued and the company was ordered to disestablish the company union and reinstate the Railway Clerks as the bargaining representative.

[4] On appeal, the Supreme Court found authority for the district court action in Section 2 (Third) of the Act. At that time the latter prohibited "* * * interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other * * *", conduct clearly similar to that involved here.[23] 2 (Fourth) was added to the Act four years after that decision and was in large part an amplification of 2 (Third). Indeed, its principal purpose was to prevent employers from coercing employees into joining unions favored by the carriers, the very action enjoined in that case. See Railway Employes' Department, American Federation of Labor v. Hanson, 351 U.S. 225, 231, 76 S.Ct. 714, 100 L.Ed. 1112 (1956). And there can be no doubt that enforcement of 2 (Fourth) was also entrusted to the courts, for no other agencies, least of all the Adjustment Boards, are either equipped or empowered to deal with conduct impairing the statutory right of employees to be free of

[23] The wording of the statute has been changed slightly. It now reads, "* * * interference, influence, or coercion by either party over the designation of representatives by the other; * * *." Act of June 21, 1934, c. 691 § 2, 48 Stat. 1186.

coercion in choosing bargaining representatives.[24] See Railway Employees Co-op. Ass'n v. Atlanta B. & C. R. Co., 22 F.Supp. 510 (D. Ga. 1938) (enforcing 2 (Fourth)); Virginia Railway Co. v. System Federation No. 40, Railway Employees Department of the American Federation of Labor, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937) (enforcing 2 (Ninth)).

[5, 6] To hold the interrelationship of 2 (Fourth), (Fifth) and (Eleventh) must be applied and interpreted solely by the Adjustment Boards, moreover, violates common sense. The argument supporting such a holding is merely that public statutory rights, when incorporated into a collective agreement, become exclusively private contract rights. Even when stated in that fashion, the argument is not convincing, for there is no reason why concurrent procedures may not exist for the enforcement of these distinct rights. But viewed in the context of enforcement of contract rights under the Railway Labor Act, it is untenable. Application and interpretation of agreements executed under that statute are the sole province of the Adjustment Boards, which are composed of representatives of the contracting parties, the employer and the union.[25] But 2 (Fourth) (Fifth) (Eleventh) embody statutory rather than contract rights and are important legislative limitations on the conduct of the very parties who make up those Boards. To entrust these parties with interpretation and enforcement of restrictions on themselves is little better than leaving them completely free to begin with. Indeed, if application and interpretation of 2 (Elev-

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[24] Under 2 (Fourth), this freedom encompasses the right *not* to join a union.

[25] Article XII(b) of the TWA-IAM collective agreement provides:

> "The System Board of Adjustment shall consist of four (4) members, two (2) selected by the Company and two (2) selected by the Union."

enth) is the sole province of the Adjustment Boards, then Congress did not "relax" the prohibitions of 2 (Fourth) (Fifth) by enacting 2 (Eleventh); it repealed them.[26]

All of this can be illustrated by hypothetical situations indistinguishable on principle from the present case. If a collective agreement contained a clause having language identical to Section 2 (Fourth) without a union shop clause, would an employee discharged for failing to join the union be relegated merely to the Adjustment Boards, agencies composed of the parties which had combined to discharge him? Would a federal court be compelled to hold Congress intended that its jurisdiction would be preempted by a contract enforceable only in an agency composed of the contracting parties? Or if, instead of that provision, the agreement had a union shop clause containing much of the language of 2 (Eleventh), and the incumbent union refused to a valid tender of dues and caused an employee to be discharged because he was a member of another union challenging the incumbent, did Congress intend the only remedy to be in an Adjustment Board composed of representatives of the incumbent and the employer? C. f. Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks, supra. If defendants' argument is correct, however, in both these situations resort must be solely to the Adjustment Boards even though, in the absence of a collective agreement par-

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[26] Compulsory unionism is by no means a dormant political issue in the United States, and only the strongest possible legislative history can override the common sense conclusion that Congress did not leave enforcement of the detailed provisions of 2 (Eleventh) to the very parties it was designed to restrict. And, indeed, this conclusion avoids serious constitutional questions. See Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243 (1926).

roting the statutory language, jurisdiction would clearly lie in the federal courts.[27]

[7] Nor is there any overriding policy compelling courts to eschew jurisdiction over such cases in favor of the Adjustment Boards. Composed of representatives of the Contracting parties, they are designed to encourage private settlements of disputes as to the meaning of contracts. This policy, however, is surely inapposite where, as here, statutory limitations on the power of the contracting parties to engage in certain conduct or to agree to certain matters is involved.

Another purpose of the Adjustment Boards is to bring to the task of interpretation of collective agreements the specialized background of the Board members. And since in 2 (Eleventh) cases, the union shop provisions of the contract may well be relevant to the determination of whether the employee was discharged "for any reason other than the failure * * * to tender the periodic dues * * *", courts may be compelled to undertake incidental "interpretation" of that portion of the contract. This is not, however, an overriding consideration. For one thing, since the employer and the union have already agreed on the validity of the discharge, it is hardly to be expected that the Board will rely heavily on expertise in reviewing the case. In any event, expertise in construing collective agreements is not expertise in enforcing statutory mandates. Union shop clauses, moreover, are not likely to raise difficult questions of interpretation. 2 (Eleventh) itself goes very far to write the parties' contract in this respect and leaves relatively few matters for private determination, little

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[27] Indeed, if defendants are correct, then enforcement of the doctrine recently enunciated in International Association of Machinists v. Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1960), may be taken from the federal courts and left solely with the Adjustment Boards merely by paraphrasing the holding of that decision as a contractual provision.

more in fact than the date on which dues must be paid, the amount, and procedures for discharge. In any case, if the particular union shop clause is ambiguous, the need for judicial protection may be greater for the opportunities for discrimination will be correspondingly increased. There is little reason indeed why such a clause should be vague for, given a desire to comply with 2 (Eleventh), all that is necessary is a clear rule uniformly applied. While questions of interpretation may arise, therefore, they are not such as to require the federal courts to abstain from exercising jurisdiction in these cases.

II *The Merits*

The contract between IAM and TWA provides:

> "(a) Each employee now or hereafter employed in any work covered by this agreement shall, as a condition of continued employment in such work, within sixty (60) days following the beginning of such employment or the effective date of this Article, whichever is later, become a member of, and thereafter maintain membership in good standing (as herein defined), in the Union, except as provided otherwise herein. Such condition shall not apply * * * with respect to any employee to whom membership is denied or terminated for any reason other than the failure of the employee to tender the dues uniformly required of other members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership.
>
> "For the purpose of this Article, 'membership in good standing in the Union' shall consist of the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month, which are uniformly required of members of his classification (and at his point on the Company's

system) as a condition of acquiring or retaining membership.

* * * * * * * * * *

"(e) When an employee becomes delinquent by not meeting the requirements of (a) above for 'membership in good standing in the Union,' the following procedure shall be observed:

"(1) The General Chairman of the Union shall notify the employee by registered letter, return receipt requested, copy to the Company's Vice President of Industrial Relations, that the employee is delinquent in the payment of dues as specified herein and accordingly is subject to discharge as an employee of the Company. * * *

* * * * * * * * * *

"(n) Whenever the term dues is referred to in this Article, such use of the word 'dues' shall include initiation or reinstatement fees, periodic dues, and assessments (not including fines and penalties), * * *."

Under the TWA-IAM collective bargaining agreement membership in good standing meant the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month. On March 13, 1956, the Union sent Brady a letter demanding dues for December, January, February and March. Under the plain terms of the contract, however, plaintiff owed only two months dues. December dues were owing no later than January 31st, January dues were owing no later than February 28th but February dues did not have to be paid until March 31st. On March 27th, therefore, the payment of two months dues—$6.50—would have precluded plaintiff's discharge. On that day, Brady tendered $10.50.

The Union rejected his tender on the grounds that $10.50 was "not sufficient to cover * * * dues *and* reinstatement fee". This certainly was sufficient to cover Brady's dues

unless he was not entitled to rely on the clear provisions of the collective agreement. To be sure, it was hardly adequate to cover $25 reinstatement fee, but that had not been demanded by the Union in its letter of March 13th.[28]

The next IAM demand was for the payment of $34.75 by April 4th to "cover past dues and reinstatement fee." Since the reinstatement fee was $25, the demand for $34.75 contemplated only a *three month* delinquency ($9.75) *by April 4th* even though the Union had previously been demanding *four months* dues by *March 28th.*[29] Indeed, on

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[28] Miller testified the March 13th letter was in error since it did not request a reinstatement fee. After he learned it had been sent to Brady, however, he told Coleman that if the four months dues requested were paid, it would be all right. Tr. 362. Since Brady had no knowledge of this conversation, its relevance after the fact is highly questionable.

Coleman's letter, moreover, written "as a result of instructions from Mr. Cliff Miller", rejected the tender of $10.50 on the grounds it was inadequate to cover "dues *and* reinstatement fee." Further, the Union constitution authorizes a reinstatement fee only after a three month delinquency. The agreement itself, while it mentions reinstatement fees, does not specify when they are to be imposed. Assuming the provisions of the Union constitution may be validly incorporated merely by such an oblique reference, they must still be read in conjunction with the explicit terms of the agreement, which is, after all, the governing document under 2 (Eleventh). Because the agreement does not require payment of dues, and thereby postpones a delinquency, until the last day of the following month, there was not a three month delinquency until March 31st. No other reading of these documents is consistent with the policy underlying 2 (Eleventh) which is designed to give affected employees adequate notice of their union security obligations. See note 28 infra, and accompanying text.

[29] Coleman explained his demand for $34.75 in the following way. It was his belief, he testified, that the December, January, and February dues still had to be paid but that the reinstatement fee took the place of March dues. He gave no indication whatsoever of the source of this belief.

All of the Union demands made upon Brady seem to have assumed that dues had to be paid by the first day of the month, i.e., December dues by December 1st, etc., that this is utterly incon-

March 28th, the Union had flatly rejected a tender more than adequate to cover three months. And since March 31st was a due date under the collective agreement, the demand for three months dues by April 4th is consistent solely with the proposition that only two months were due March 27. The IAM, however, quickly abandoned the $34.75 demand, but not on the grounds that the amount of dues demanded was too little. The Union's final position was merely that payment of the reinstatement fee alone was adequate.

Defendants have argued that, in any event, the demands of the March 13th letter were not oppressive since at that point even more severe penalties, discharge or a reinstatement fee, could have been imposed. This contention, however, overlooks the fact that only past dues were demanded and these in an excessive amount. There is little reason why Brady or any employe in a similar position should be obligated to explore what other and more severe penalties could be imposed in order to determine whether compliance with an *ad hoc* demand of the Union is necessary. Since the letter of March 13th asked only for past dues, Brady had ever right to calculate under the terms of the agreement alone, the amount owed and to tender that sum. And, indeed, the Union's rejection of the tender, as reflected in the March 28th letter, was not based merely on an alleged insufficiency as to dues but on its failure "to cover * * * dues *and* reinstatement fee" (emphasis added).

It is the Court's view, therefore, that regardless of what other penalties might have been available to the Union on March 13th, its own requests were sufficient to justify

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sistent with the contract specification that "payment . . . [must be made] not later than the last day of the following calendar month. * * *" is too plain for argument. The contract, moreover, is the governing document, for 2 (Eleventh) validates union shop provision only when incorporated into an "agreement". Requirements inconsistent with the contract, whether in the Union constitution or in letters to Brady, can be of no effect.

Brady's tender of March 27th. But, in any event, no other penalties were available at that date. Discharge could occur only after compliance with the procedural requirements as to notice specified in the collective agreement. This had not been done on March 13th. Further, a reinstatement fee could not be imposed until there was a three month delinquency and that did not occur until March 31st.

[8] All of this is perfectly consistent with Section 2 (Eleventh). That provision allows discharges otherwise violative of 2 (Fourth) only when a proper union security clause has been incorporated into an *agreement*. Plainly, one purpose underlying this requirement is to give adequate notice to affected employees of their union security obligations.[30] In short, employees need not resort to *ad hoc* correspondence from Union officers to determine their rights and duties. In the present case, however, the IAM's defense has been based almost exclusively upon letters sent to Brady which neither complied with the agreement nor were consistent with each other. There is no reason whatsoever why TWA and the IAM cannot incorporate clear union security provisions into their agreement which give adequate notice to the affected employees of the obligations imposed. Nor is there any reason why, having written such provisions into the agreements, they cannot apply them uniformly and comply with the requirements themselves. There is every reason why, however, they should not be allowed to discharge employees when they have failed to do these things. In the present case, the agreement is relatively clear, but IAM's rejection of Brady's March 27th tender did not comply with it and was utterly inconsistent with any obligations of which Brady had proper notice.

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[30] Arguably, this policy might prohibit incorporation of Union constitution provisions merely by reference. In this case, application of such a rule would bar imposition of a reinstatement fee. See note 27, supra. That is, however, unnecessary to decide.

[9] Because Brady's tender was sufficient to cover "the periodic dues * * * uniformly required * * *," the discharge is not protected by 2 (Eleventh). It is, therefore, violative of 2 (Fourth).

[10] One problem remains: whether the IAM should be held jointly liable with TWA.[31] Section 2 (Fourth) prohibits carriers from exercising coercion. It says nothing express about unions. Section 2 (Eleventh), however, the exception to Section 2 (Fourth), uses the term "agreements". It was within Congress' contemplation that both the Union and the carrier would be signatory to the collective bargaining agreements. Since both parties were treated equally in Section 2 (Eleventh), and since Congress knew that the section was an exception to certain prohibitions, it is sound to conclude that Congress thought the Union might also be liable under Section 2 (Fourth) when it caused an illegal discharge.[32]

III *Exhaustion of Intra-Union Remedies*

[11] IAM contends plaintiff may not bring this action because he failed to exhaust his intra-union remedies. But the only matter involved in this case is the legality of Brady's discharge under the Railway Labor Act, not the legality of the increase in dues or even IAM's rejection of his March 27th tender. After this decision, IAM is free to continue to reject Brady's dues, if it desires, so long as TWA does not discharge him. Brady, moreover, is seeking reinstatement in his job and neither the Union President, its executive council nor the National Convention can

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[31] The TWA-IAM agreement contemplates that TWA might be found liable for illegal discharges under the union security agreement and provides that the IAM will indemnify it for losses incurred. PX 6, TWA-IAM Union Shop Agreement, Art. XXVI, para. (p).

[32] The Taft-Hartley analogy may again be relevant, see note 19, supra, for under 29 U.S.C. § 158(b)(2), the Union would be liable in these circumstances.

grant him that. Indeed, the most they can do is apologize. The available intra-union remedies are, therefore, not only inadequate but irrelevant.

[12] In any event, the doctrine of exhaustion of internal union remedies is entirely inapplicable in situations, as here, which do not involve internal union problems. Under the Railway Labor Act, IAM is entirely free to reject Brady's tender of dues and even to expel him. It may do all of these things because they involve the union-member relationship and the Act leaves that untouched.[33] But when the Union strikes at the employment relationship and has an employee discharged, that is a different matter. At that point, it ceases to be a solely internal union problem, if for no other reason, because the employer is now involved. Nor is there anything whatsoever in the statutory language or legislative history supporting the IAM's contention. The Taft-Hartley analogy—which Congress explicitly had in mind when it drafted 2 (Eleventh)[34]— is again appropriate. No one has even suggested, much less held as a matter of law, that an employee illegally discharged under a Union security agreement, must exhaust internal Union remedies before applying to the National Labor Relations Board for relief under Section 8(a)(3). Policies, such as the exhaustion doctrine, designed to give private organizations principal responsibility for governing their internal affairs are, therefore, wholly inapposite in situations involving federal regulations of the employment relationship.

IV

[13, 14] The Court previously severed the trial of the liability issues from the damage questions. The nature of plaintiff's recovery still must be explored. For the guid-

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[33] Except, of course, where that relationship is such as to violate the "uniformity" requirement of 2 (Eleventh).

[34] See note 19, supra.

ance of the parties, plaintiff will be entitled to compensatory damages and reinstatement. The Court finds no barriers to this latter form of relief since it merely involves a mandatory injunction and that has been used in analogous situations by the Supreme Court.[35] Such relief is also supported by the Taft-Hartley analogy[36] and seems necessary to effectuate the congressional policy fully.

The foregoing opinion is adopted as the Court's findings of fact and conclusions of law pursuant to F.R. Civ. P. 52 (a), 28 U.S.C.A.

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[35] See Virginian Railway Co. v. System Federation, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937).

[36] Reinstatement is a common remedy under Taft-Hartley. 29 U.S.C. § 160(c). Even though the liability issue has been severed from damages, the availability of reinstatement has been dealt with at this stage because one contention of defendants has been that Brady's demand for reinstatement ousts the Court from jurisdiction.

Vincent P. Brady, *Plaintiff,*

v.

Trans World Airlines Inc., a corporation of the State of Delaware, and The International Association of Machinists, an unincorporated association, *Defendants.*

Civ. A. No. 1884.

United States District Court

D. Delaware.

Sept. 3, 1965—244 F. Supp. 820

* * * * * * * * * *

CALEB M. WRIGHT, Chief Judge.

The Court has found for plaintiff on the question of liability. See Brady v. Trans World Airlines, Inc., 223 F. Supp. 361 (D. Del. 1963). The question of damages has been reserved. This opinion deals with damages.

The facts of this case are adequately set out in the opinion cited and will not be repeated. While that opinion concerned jurisdiction and the merits of Brady's claim, the Court concluded:

> "For the guidance of the parties, plaintiff will be entitled to compensatory damages and reinstatement. The Court finds no barriers to this latter form of relief since it merely involves a mandatory injunction and that has been used in analogous situations by the Supreme Court. Such relief is also supported by the Taft-Hartley analogy and seems necessary to effectuate the congressional policy fully."[1]

Thus the Court indicated prospectively that the elements of recovery which would be considered were reinstatement and compensatory damages. Subsequent argument con-

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[1] Brady v. Trans World Airlines, Inc., 223 F.Supp. 361, 370 (D.Del.1963).

cerning the damages recoverable by Brady and briefs directed to that question have not altered this conclusion.

[1, 2] Brady must be reinstated in the same position he held before his discharge or in a substantially equivalent position. In determining whether a new position is substantially equivalent to the one previously held by Brady, such factors as seniority rights, fringe benefits, wages, hours, and security of position are to be considered. See CCH Labor Law Reports ¶ 4730. Furthermore, whether Brady is reinstated in the same position he held before discharge or in a substantially equivalent position, it should be kept in mind that he is entitled to the benefits he would have had *now* had he not been discharged and not just to the same job or one equivalent to it at the time of his discharge minus the benefits which have accrued to the position in the years since discharge.

[3] The element of compensatory damages is somewhat more troublesome. Into this recovery plaintiff seeks to inject such items as back pay, damages for mental suffering arising from the humiliation and embarrassment caused Brady by his illegal discharge, damage to reputation, unforeseen expenses and punitive damages assessable against defendant IAM for willful and deliberate acts of discrimination. Further, Brady has recently moved to join his wife as an additional party plaintiff claiming damages for loss of consortium.

In addition to reinstatement the Court finds Brady entitled only to an award of back pay. Not only does the Court deem such recovery adequate to compensate Brady, but it is the sole recovery which is supported by the Taft-Hartley analogy relied upon by Congress in enacting 2 (Eleventh).[2] While other measures of recovery are not

[2] The Court previously pointed out that Congress was expressly aware of the relation of Taft-Hartley and the Railway Labor Act. See Brady v. Trans World Airlines, Inc., 223 F.Supp. 361 at 364-365 (D. Del. 1963).

specifically denied to employees unlawfully discharged within the terms of Taft-Hartley, reinstatement and back pay are expressly provided in that Act.[3] This Court will not read into the provisions of the Railway Labor Act the full scope of common law tort and contract recovery without express congressional provision therefore and with the example of Taft-Hartley to the contrary.

[4] In computing the amount due Brady as back pay, Brady's earnings since his discharge must be deducted from the amount he would have earned had he not been discharged.

Defendant IAM contends that Brady is entitled to no more than nominal damages because he failed to mitigate his damages by paying the $25 reinstatement fee demanded of him by the union. This fee, defendant points out, was only $8.75 more than the dues Brady owed. Because the amount required to achieve reinstatement was small, because Brady's refusal to pay was motivated by a spirit of "non-conforming eccentricity" and because, the reasonably prudent man would have sought reinstatement and *then* pursued his remedies, the argument goes, Brady's refusal to pay the $25 reinstatement fee amounts to failure to comply with the duty to mitigate damages.

The Court has upheld Brady's right to refuse to pay the reinstatement fee because he did not owe it. Judged by the defendant's own prudent man standard, Brady was justified in refusing to pay the $25 reinstatement fee.

Section 14 of the IAM constitution reads:

> "Sec. 14. Delinquency for 3 months in the payment of dues or assessments shall automatically cancel membership and all rights, privileges and benefits incident thereto. The period of good standing membership of members whose membership has been cancelled for delinquency, or other cause shall date from their last

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[3] 29 U.S.C.A. § 160(c).

> reinstatement, as shown by the G.L. records, and their rights, priivileges and benefits under the provisions of this Constitution shall attach and date from their last reinstatement, as though they had never before held membership in the I.A.M." Section 14, Article E, Constitution IAM, effective April 1, 1954.

Thus, it would be reasonable for Brady to believe that if he paid the reinstatement fee, he might get his old job but his seniority with its attendant benefits would date from the time of reinstatement. Whether or not this belief would be borne out after further resort to internal union remedies, the fear that his seniority would be lost was not unreasonable under the circumstances. Therefore the payment of $25 did not represent the opportunity which IAM supposes.

It should be noted, moreover, that IAM's illegal act was not in requesting an excessive sum from Brady but in causing TWA to discharge him because he would not pay it. Defendants' argument, therefore, compels one in Brady's position to anticipate illegal conduct and to comply with all of the defendants' demands lest the latter be tempted to violate a legal duty. It is little better than arguing that a person wounded by a robber may not sue for the full extent of his personal injuries because he would not have been shot had he turned over his wallet.

[5, 6] In any event, the evident congressional purpose would not be fulfilled by such a holding. Section 2 (Fourth), (Fifth), (Eleventh) represent a compromise under which employment may be conditioned upon compliance with union demands only to the extent of payment of uniform periodic dues. Demands going beyond this may not be enforced by causing the employer to exercise his economic power against the offending employee. Clearly, Congress desired to protect the employee's right to dissent and to disobey union instructions (or, indeed, to be moved by a spirit of "non-conforming eccentricity") without fear

of reprisals involving the employment relationship. On the other hand, "free rides" are not possible because all members of the unit can be required to pay dues.

To hold that employees suing under 2 (Fourth), (Fifth), (Eleventh) may recover only the amount of the excessive sums demanded, however, would not effectuate that purpose. If that were the law, dissenting employees could be harassed by excessive demands for dues under the threat of discharge and their only remedy would be to hire a lawyer and sue for reimbursement. Congress might as well have legalized the closed shop as have enacted such a cynical and toothless provision. It should further be noted that the corresponding provisions of the Taft-Hartley Act have not been read so as to require mitigation.

Finally, the Court must consider plaintiff's motion to join Mrs. Brady as a party seeking damages for loss of consortium. Plaintiff concedes that Mrs. Brady's claim derives from that of her husband. "Mrs. Brady's claim is a claim for her pain and suffering which results derivatively from the pain and suffering suffered by her husband. If he has no claim, logically, she has no claim."[4]

The Court has found that Brady has no claim for damages for pain and suffering. Thus, Mrs. Brady has no claim. The motion to join her as a party plaintiff is denied.

In conclusion, the Court finds plaintiff entitled to reinstatement and back pay due to his illegal discharge from the defendant, TWA. See Brady v. Trans World Airlines, Inc., 223 F. Supp. 361 (D. Del. 1963). The incidents of said reinstatement and back pay are outlined above.

Present order.

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[4] Letter memorandum of counsel for plaintiff dated October 26, 1964, p. 2.

Memorandum Opinion of District Court

September 6, 1966.

(Unreported)

WRIGHT, Chief Judge.

The Court has previously found for plaintiff on the question of liability, see Brady v. Trans World Airlines, Inc., 223 F. Supp. 361 (D. Del. 1963), and has already discussed the issue of damages, see Brady v. Trans World Airlines, Inc., 244 F. Supp. 820 (D. Del. 1965).

The facts of this case and the law concerning damages are adequately set out in the above cited opinions and will not be rediscussed. The Court's present concern is to determine the damages received by Brady and to order the proper remedy to correct them.

REINSTATEMENT

The Court has considered all the evidence presented concerning Brady's reinstatement. Although TWA will incur some cost in retraining Brady, Brady can be retrained and can become an adequate aircraft machinist again. The cost of retraining Brady to service jets should be less than the cost of training a raw recruit since Brady is already familiar with aircraft and holds a license to maintain an aircraft propelled by reciprocating engines, consequently no great hardship will be imposed on TWA. Moreover, Brady requests reinstatement and, on balancing the various considerations involved, including the public interest in airline safety, the Court feels reinstatement is the proper remedy. He shall be reinstated in accordance with the Opinion of Brady v. TWA, 244 F. Supp. 820 (D. Del. 1965).

BACK PAY AWARD

Brady is entitled to the difference between what he would have earned from TWA if he had not been illegally discharged minus what he actually earned following his

discharge. Brady v. TWA, 244 F. Supp. 820 (D. Del. 1965).

In computing Brady's actual earnings during this period, unemployment compensation payments have not been included. Cf. National Labor Relations Board v. Gulett Gin Co., 340 U.S. 361 (1950). The Court also finds that Brady was justified in leaving Capitol Air Sales in 1961 so he has not failed to mitigate his damages.

Brady's loss of earnings from 1956-1964, taking into account the entire period including those years in which Brady earned more than the average of comparable employees	$ 7,241.24
Brady's loss of earnings in 1965 compared to average of comparable employees	2,816.09
Brady's loss of earnings from Jan. 1, 1966, to June 30, 1966, compared to comparable employees	560.47
Total Back Wages Owed Brady	$10,617.80

No award of back wages has been allowed from June 30, 1966, to date because no figures concerning this period have been submitted to the Court.

Fringe Benefits

Having ordered reinstatement, Brady is entitled to reinstatement in all fringe benefit programs as if he had continued in TWA's employment without interruption by the illegal discharge. However, two fringe benefits must be discussed to some extent.

Brady would have been entitled to various free airline passes during this period had he been in TWA's employment. These passes can only be used by Brady and the member of his immediate family so that unless used each year they would lapse. Furthermore, the passes are subject to the contingency that space is available on the particular flight. Brady has requested the reasonable value of these passes during the period following his illegal dis-

charge. However, Brady has not introduced any evidence on which this Court could determine the financial value of the passes. No award can be made for them.

Turning to the retirement program of which Brady was a member when discharged, Brady should be reinstated in it; however, this is a volutnary program into which the employee and employer each contribute a certain amount. To be reinstated in this program, Brady must contribute the sum which he would have contributed over this period as well as having TWA contribute its share. All other fringe benefits at TWA were comparable to those Brady enjoyed at his other places of employment, and reinstatement in the TWA's programs is adequate to compensate Brady.

Counsel Fees

On July 19, 1966, the Court wrote the parties requesting that they brief the question of whether attorney's fees were appropriate in this case. On July 21, 1966, Brady's present counsel stated he would not make an application for attorney's fees, but wished the Court to delay until Counsel, who had previously been in the case and had withdrawn, had an opportunity to petition the Court. On August 24, 1966, the previously retained counsel, who had withdrawn, wrote the Court and stated that he would not press for an allowance of attorney's fees to be paid by the defendants. Since neither counsel has made a formal application for counsel fees, the Court need not determine if counsel would be entitled to them.

The foregoing opinion is adopted as the Court's findings of fact and conclusions of law pursuant to F.R. Civ. P. 52(a), 28 U.S.C.A.

Wilmington, Delaware
September 6, 1966

District Court Order of September 6, 1966
(Unreported)

AND NOW, TO WIT this 6th day of September, 1966, the Court having had before it plaintiff's motion to amend to add a party, and question as to the measure of damages, briefs having been filed, and the matter having been considered in the Court's Opinion of September 3, 1965, and the Court having heard the testimony as to damages on July 7, 1966, and having explained its computation of them in a Memorandum Opinion filed this date; it is

(1) ORDERED, that plaintiff be reinstated to the same or a substantially equivalent position by defendant, Trans World Airlinnes, Inc. with company seniority from October 1, 1946 and Philadelphia Point Seniority date from February 21, 1951; it is

(2) FURTHER ORDERED, that defendant Trans World Airlines, Inc. shall secure for plaintiff without cost to plaintiff such additional training and schooling as plaintiff shall require for employment as an aircraft mechanic; and it is

(3) FURTHER ORDERED, that defendant Trans World Airlines, Inc. shall secure to plaintiff the following additional rights without cost to plaintiff as though plaintiff's employment had been without interruption: Membership in the Retirement Fund, Membership in the Group Life Insurance Plan, Membership in the Group Hospital Plan, Membership in the Group Health and Accident Plan, or equivalents; in respect to membership in the retirement plan, Brady shall be reinstated in full membership in good standing and all payments which should have been made by TWA shall be made by TWA, and all payments which should have been made by Brady shall be paid by Brady; and it is

(4) FURTHER ORDERED, that such other or additional fringe benefits shall be restored to plaintiff by defendant Trans World Airlines, Inc. without cost to plaintiff as

though plaintiff's employment had been continuous; and it is

(5) FURTHER ORDERED, that The International Association of Machinists shall reinstate plaintiff in membership, in good standing, without cost to plaintiff, in The International Association of Machinists with seniority from October 1, 1946 and Philadelphia Point Seniority from February 21, 1951, as though plaintiff's membership had been without interruption and with all the prerequisites and rights incident to such seniority; and it is

(6) FURTHER ORDERED, that plaintiff shall receive as damages for back pay the amount of $10,617.80; and it is

(7) FURTHER ORDERED, that plaintiff shall not be liable for costs in the District Court; and it is

(8) FURTHER ORDERED, that for the purposes of paragraphs 1-6 of this order, the effective date upon which plaintiff shall be restored to his various rights shall be the date upon which any appeal or petition for certiorari, motion for reargument, or the like, if any, whether taken by plaintiff or defendants shall become final and binding upon the parties and no further application may be made within the judicial system of the United States; and it is

(9) FURTHER ORDERED, that plaintiff's application to join as a party-plaintiff plaintiff's wife be and the same is denied.

• • •

SUPREME COURT, U. S.

DEC 13 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968.

No. 712.

THE INTERNATIONAL ASSOCIATION OF MACHINISTS,

Petitioner,

v.

VINCENT P. BRADY,

Respondent.

No. 713.

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

VINCENT P. BRADY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes	3
Counter-Statement	4
Argument	14
I. Reasons for Denying the Petition Filed by the I. A. M.	14
A. The Decision of the Court of Appeals That the Airlines Systems Board of Adjustment Did Not Have Jurisdiction to Consider a Controversy Between an Employee and His Bargaining Agent, Where Only Incidental Interpretation of the Bargaining Agreement Is Involved, Does Not Conflict With the Decisions of This Court or the Decisions of Other Courts of Appeals ..	14
B. The Holding of the Court of Appeals That the Claim of Hostile and Bad Faith Discrimination in the Complaint Raises a Federal Question, Does Not Conflict With Decisions of This Court or the Decisions of Other Courts of Appeals ..	19
C. The Decision of the Court of Appeals That Brady Who Was Caused to Be Discharged From His Employment by the I. A. M. in Violation of the Railway Labor Act Was Not Required to Exhaust Internal Union Remedies Before Seeking Reinstatement to Membership in the Union and to His Employment in the Federal Courts Does Not Conflict With Decisions of Other Courts of Appeals	23

INDEX (Continued).

Page

D. The Court of Appeals Was Correct in Finding That the Complaint as Amended Raised the Issue of Hostile and Bad Faith Discrimination 26

E. The Court of Appeals Decision Does Not Err in Any Substantial or Important Respect 27

II. Reasons for Denying the Petition Filed by T. W. A. .. 29

CONCLUSION 30

CASES CITED.

Page

Alabaugh v. Baltimore & Ohio R. Co., 222 F. 2d 861 (Fourth Cir. 1955), cert. den. 250 U. S. 839 19

Brady v. I. A. M., et al., 167 F. Supp. 469 18

Brady v. I. A. M., et al., 174 F. Supp. 360 (1959) 19, 21, 28

Conley v. Gibson, 355 U. S. 41 (1957) 15, 19, 20

Cunningham v. Erie R. R., 266 F. 2d 411 (2 Cir. 1959) ..19, 20, 22

Cunningham v. Erie Railroad Co., 358 F. 2d 640 (2nd Cir. 1966) 15, 20, 29, 30

Ford Motor Co. v. Huffman, 345 U. S. 330 (1953) 20

Gainey v. Brotherhood of Railway and Steamship Clerks, et al., 275 F. 2d 342 (3rd Cir. 1960) 25

Humphrey v. Moore, 375 U. S. 335 (1964) 20

Noble v. Woodward, 200 F. Supp. 785 (E. D. Pa. 1962) 20, 29

Radio Off. Union of the Comm. Telegraphers Union, AFL v. NLRB, 347 U. S. 17 20

Richardson v. Texas & New Orleans Railroad Co., 242 F. 2d 230 (5th Cir. 1957) 29

Rumbaugh v. Winifrede R. R., 331 F. 2d 530 (4th Cir.) cert. den. 371 U. S. 929 (1964) 20

Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (1963) 19, 20

Vaca v. Sipes, 386 U. S. 171 (1967) 20

STATUTES AND AUTHORITIES CITED.

Page

Railway Labor Act, 45 USCA:

§ 152 ..... 1, 2, 3, 20

§ 154 21

§ 184 ..... 2, 3, 14

Note, 76 Yale L. J. 210 (1966) 15, 20

OPINIONS BELOW.

The reported opinions of the District Court (Appendix D of Petition) may be found at 156 F. Supp. 82 (1957); 167 F. Supp. 469 (1958); 174 F. Supp. 360 (1959); 196 F. Supp. 504 (1961); 223 F. Supp. 361 (1963); and, 224 F. Supp. 820 (1965). The unreported memorandum opinion and order may be found in Appendix D of Petition, p. 111a and 114a.

The opinion of the Court of Appeals, yet unreported, may be found in Appendix B of the Petition, p. 6a.

JURISDICTION.

Federal Question Jurisdiction exists by virtue of the alleged and proven violation of the Railway Labor Act, 45 USCA § 152 (Fourth) and (Eleventh) and the alleged and proven hostile discrimination practiced by a union upon a union member to secure his discharge from his employment in violation of the said act.

QUESTIONS PRESENTED.

1. Was not the Court of Appeals correct in ruling that a Systems Board of Adjustment established pursuant to the requirements of Section 204 of the Railway Labor Act (45 USCA Sec. 184) did not have jurisdiction over a dispute primarily between an air line employee and his bargaining representative where only incidental interpretation of the Bargaining Agreement was involved?

2. Was not the Court of Appeals correct in ruling that the decision of a Systems Board of Adjustment was not final and binding upon an airline employee where the Systems Board did not have jurisdiction over the subject matter of the dispute between the employee and his bargaining representative in the first instance?

3. Was not the Court of Appeals correct in ruling that Federal Question Jurisdiction existed over an action by a discharged air line employee against his union and his employer seeking reinstatement to membership in his union and to his employment where willful and deliberate discrimination by his bargaining representative to effect his discharge is alleged and proven?

4. Assuming *arguendo* that the answer to 3 is "No", was not the Court of Appeals correct in ruling that Federal Question Jurisdiction existed over an action by a discharged air line employee against his union and his employer seeking reinstatement to membership in his union and to his employment where it is alleged and proven that his discharge violated the Railway Labor Act, 45 USCA § 152 (Fourth) and (Eleventh).

5. Assuming *arguendo* that the answers to Questions 3 and 4 are "No", does not Federal Question Jurisdiction

exist over an action by a discharged air line employee against his union and his employer seeking reinstatement to membership in his union and to his employment where it is alleged and proven that the provision of the union constitution, as interpreted by the union and upon which the union justified its action in canceling the employee's union membership and causing his discharge, conflicted with the clear union security provision of the Bargaining Agreement and thus violated the Railway Labor Act, 45 USCA § 152 (Eleventh).

6. Was not the Court of Appeals correct in holding that the doctrine of exhaustion of internal union remedies did not apply to a union employee who was caused to be discharged from his employment by his bargaining representative in violation of the Railway Labor Act?

7. Was not the Court of Appeals correct in holding that a union member had maintained good standing membership in the union by payment of dues and was not subject to cancellation of union membership nor to discharge from his employment?

8. Was not the Court of Appeals correct in holding that the employer was jointly liable with the bargaining representative for causing the discharge of an employee in violation of the Railway Labor Act, 45 USCA § 152 (Fourth) and (Eleventh)?

STATUTES.

The pertinent provisions of the Railway Labor Act, 45 USCA § 152 (Fourth), (Fifth), (Seventh) and (Eleventh); and Section 184, are set forth in Appendix A of the Petitions filed by the I. A. M. and T. W. A.

COUNTER-STATEMENT.

Vincent P. Brady's (Brady) action against Trans World Airlines (T. W. A.) and the International Association of Machinists (I. A. M.) seeks reinstatement to his employment and membership in the I. A. M. as well as legal damages, including punitive damages, caused by his unlawful discharge in violation of the Railway Labor Act, 45 U. S. C. A. Sec. 152 (Eleventh) and (Fourth).

The District Court found the I. A. M. and T. W. A. jointly liable to Brady and ordered that he be reinstated to his employment with T. W. A. (with all benefits) and to membership in the I. A. M., and be paid $10,617.80 in back wages; but the District Court denied Brady's claim to common law damages.[1] The District Court's decision was affirmed by the United States Court of Appeals for the Third Circuit.[2] This Brief is filed by Brady as Respondent to the Petitions for Writ of Certiorari filed by the I. A. M. (No. 712) and T. W. A. (No. 713).

Brady has also filed a Cross-Petition for Writ of Certiorari, No. 735, October Term, 1968, requesting review of that portion of the decision of the Court of Appeals which denied Brady a jury trial to prove common law damages, *i.e.*, compensatory damages for the pain and suffering incurred by him and his wife by reason of the unlawful discharge, legal expenses and punitive damages.

On May 8, 1956, Brady was discharged from his employment with T. W. A. in violation of the Railway Labor Act, 45 U. S. C. A. Sec. 152 (Eleventh) and (Fourth). Brady's discharge, although unlawful, was upheld by an Airline Systems Board of Adjustment, on May 14, 1956.

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1. *Brady v. T. W. A., et al.*, (Petitioners' Appendix D, pp. 111a-113a).

2. *Brady v. T. W. A., et al.*, (Petitioners' Appendix B, pp. 6a-39a).

Brady was employed by T. W. A. from 1951 through his discharge in May, 1956 (N. T. 14).[3] He was a line mechanic and a member of local 1776 of the I. A. M. (N. T. 17). He was elected to the position of shop steward in local lodge 1776 in the early part of 1956 (N. T. 20).

Brady submits that the I. A. M. through hostile and bad faith discriminatory practices secured his discharge from his employment with T. W. A. in violation of the Railway Labor Act, because he outwardly opposed union procedures used to raise the dues of the membership.

While serving as a shop steward, Brady was approached by a number of employees who were disgruntled over the procedures used by the I. A. M. in raising the dues of membership for the local from $3.00 per month to $3.25 per month. These employees asked Brady to help them protest against the union procedures (N. T. 24-25).

Brady attended the next meeting of the membership, held in December of 1955, and opposed the dues increase. A motion made by Brady to rescind the dues increase and reconsider the entire dues question at the next general meeting to be held in January, 1956, passed by a vote of 14 to 3. The vote also directed the posting of notices to explain the details of the dues question prior to the January, 1956, meeting (N. T. 22-26) (Exhibit P-26).

The I. A. M. never posted notices of the meeting, and, in fact, never held a general meeting in January, 1956 (N. T. 26). Brady complained bitterly to local and international officials about the treatment of the membership. He wrote a letter on February 9, 1956 to the International President, A. J. Hayes (Exhibit P-63) to formalize his complaint, and he refused to tender dues except at the old rate

3. References are to the Notes of Testimony of the hearing held August 27, 1962.

until March 27, 1956, when he paid dues in full at the new rate.

The bizarre set of events that followed which ended in Brady's discharge clearly establish that he was subjected to hostile and bad faith discrimination. The I. A. M. made three different demands upon Brady in March and April, 1956, within a period of thirty days (Exhibits P-3, P-4, P-14). The first demand was made March 13, 1956, when Miller demanded dues be paid by March 28, 1956 (Exhibit P-3). The second demand occurred on March 28, 1956, when Coleman, after receiving Brady's tender of dues, and after consulting with Miller, notified Brady by duplicate letters that he was rejecting his tender, and demanding three months dues (which Brady had already paid) and a $25.00 reinstatement fee (Exhibit P-4) (N. T. 259, 273). The third demand was made on April 11, 1956, when Miller demanded only a reinstatement fee (Exhibit P-14).

Brady, in response to the first demand, tendered dues on March 27, 1956, just within the time limitation set in Miller's letter of March 13, 1956 (N. T. 242). Brady's tender was for $10.50 and was intended to cover three months dues—December, 1955 (due January 31, 1956), January, 1956 (due February 28) and February, 1956 (due March 31).[4] Brady even submitted his dues book with his March 27, 1956 tender so that there would be no doubt as to the intended purpose of the payment (N. T. 242, 254).

When the second demand was made by Coleman on March 28, 1956, requesting payment of three months dues

4. Article XXVI(a) (Exhibit P-6) entitled "Union Security" provides: ". . . for the purpose of this Article, 'membership in good standing in the union' shall consist of the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month, which are uniformly required of members of his classification (and at his point on the company's system) as a condition of acquiring or retaining membership."

Brady had paid dues through November, 1955.

($9.75),[5] which Brady had already paid, and a $25.00 reinstatement fee, Brady complained to union and company personnel about the switch in the union demands (N. T. 44-47).[6] He was informed that the matter was out of control and that "it is between you and the union. It is a union matter." (N. T. 47).

Brady also sent telegrams to Miller and to the Industrial Relations Section of T. W. A. requesting assistance on the application of the union security provisions of the bargaining agreement (N. T. 47-54). Concerned that payment of a reinstatement fee would result in loss of seniority, Brady filed his first appeal to the Systems Board of Adjustment on April 3, 1956, requesting that they review his circumstances and the demand made by the I. A. M. for a reinstatement fee (N. T. 55).

Upon learning from Coleman that Brady had not met the demands of Coleman's March 28, 1956 letter (Exhibit P-4), Miller certified Brady for discharge (Exhibit P-15) and asked Coleman to give him in writing a summary of Coleman's correspondence with Brady which evidenced Brady's attempts to pay dues (Exhibit P-11) (N. T. 309, 397). After reviewing the material sent by Coleman, Miller realized that the union had made an erroneous demand upon Brady in requesting both dues and a reinstatement fee (N. T. 281, 297) and thereupon proceeded to cancel the initial discharge action (Exhibit P-15).

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5. The actual dues increase that was placed into effect by the I. A. M. for Local 1776 was $.25 per man (J. A. 348a). Brady believed the dues were raised $.50, which was the reason he tendered $10.50 (J. A. 352a).

6. The I. A. M. by demanding a reinstatement fee was invoking the cancellation of membership provision of the I. A. M. Constitution. See Article E, Sec. 14 (Exhibit P-7) which provides: "Membership Cancelled, Sec. 14. Delinquency for 3 months in the payment of dues or assessment shall automatically cancel membership and all rights, privileges and benefits incident thereto . . ."

After Miller had cancelled Brady's initial discharge, he wrote on April 11, 1956, to Brady demanding that a reinstatement fee be paid by April 28, or a second discharge action would be initiated (Exhibit P-14). Brady, on April 18, 1956, wrote Miller that he be given the opportunity to pay his dues rather than a reinstatement fee, as he did not wish to lose his seniority with T. W. A. (Exhibit P-19). Miller rejected Brady's offer to pay dues (Exhibit D-2). Brady then filed his second appeal to the Systems Board of Adjustment requesting that they review Miller's demand for a reinstatement fee (N. T. 58-59).

After the I. A. M. had rejected Brady's March 27, 1956, tender of dues and his other appeals, he felt that the union was out to get him (N. T. 44), and that his job was in jeopardy (N. T. 53). Brady appealed to the Systems Board of Adjustment because he felt that unless he did, he would forfeit his job without any further action being taken (N. T. 53).[7]

Aside from the fact that Brady thought he was required to appeal to the Systems Board, he also felt that he would receive an objective hearing since the Board did consist of members of the employer as well as the I. A. M. (N. T. 53-54). However, because Miller in his presentation to the Board advocating Brady's discharge, misrepresented certain essential facts, there existed no possibility that Brady would receive a fair hearing (Exhibits P-1, P-2).

Miller represented to the Systems Board that Brady, on March 27, 1956, tendered dues at the rate of $3.00 per month rather than the required $3.25 per month (Exhibits P-1, P-2), whereas, Coleman had previously informed Miller that Brady had tendered his dues (N. T. 256-259), and also

7. T. W. A.-I. A. M. agreement, Article XXVI, "(f) . . . In the event no protest is so filed within the above time limits, the action will be considered as proper and will be final and binding upon all parties concerned."

informed Miller of the exact amount of the check (N. T. 258). Miller also had available a letter from Coleman dated April 7, 1956 (Exhibit P-11), stating specifically that Brady had paid dues on March 27, 1956.[8]

Miller represented to the Systems Board that Brady had been informed prior to March 27, 1956, that he was also subject to automatic cancellation of his union membership and was required to pay a reinstatement fee (Exhibits P-1, P-2) whereas Miller's March 13, 1956, demand letter did not request a reinstatement fee (Exhibit P-3), and Brady, prior to March 27, 1956, had never been asked to pay one (N. T. 49-50, 375). In addition, Miller admitted that if Brady had tendered four months dues on March 27, 1956 (which would have involved an additional $2.50), rather than three, it would have been accepted (N. T. 396). Yet, Miller never explained to Brady why four months dues instead of two were demanded under the Bargaining Agreement, and, after March 27, 1956, Miller never again gave Brady the opportunity to retender dues.

Miller also told the Board that he instructed Coleman to give Brady until April 4, 1956, to pay dues, since Brady had indicated a desire to pay previously (Exhibits P-1, P-2); whereas Coleman, after talking to Miller by telephone on March 28, 1956 (N. T. 254-259), immediately wrote Brady duplicate letters demanding three months dues plus a reinstatement fee (N. T. 259, 274), and even Miller, in his April 11, 1956, letter to Brady, stated that Coleman erroneously demanded both dues and a reinstatement fee, and that he only should have demanded a reinstatement fee (Exhibit P-14).

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8. Coleman's April 7, 1956, letter to Miller pointed out three times when Brady had tendered dues at the rate of $3.00, then, in the last paragraph stated (Exhibit P-11):

> "The fourth and final time was on March 27, when he sent the dues and no reinstatement fee. Acting on your advice I returned it with a letter stating the reason."

Lastly, the copy of Coleman's March 28, 1956, letter that Miller read to the Systems Board, omitted the reference in that letter to the amount of Brady's previous tender on March 27. Compare the letter read to the Systems Board of Adjustment by Miller at the May 4th and 14th, 1956 hearings (Exhibits P-1 and P-2)—(see Exhibit P-13) with the copy of the original sent to Brady (Exhibit P-4).

It was in reliance upon testimony presented by Miller, that the Systems Board, consisting of two representatives of T. W. A. and two representatives of the I. A. M., affirmed Brady's discharge (Exhibit P-73). The Systems Board believed that Brady had not tendered sufficient dues to maintain his membership in good standing under Article XXVI(a), and upheld his discharge.

At trial, Miller and Coleman both testified that they understood dues were payable on the first day of the month (N. T. 247, 389), even though Article XXVI(a) provided otherwise. In practice, however, during the month and a half preceding the discharge these individuals, particularly Coleman, treated other employees quite differently than they treated Brady in enforcing the dues collection procedures of Local 1776. For instance, Coleman would permit other employees to pay less than he believed to be due (N. T. 222);[9] would be lenient if the employee expressed an interest and intent to pay (N. T. 232); would make change if an odd amount was paid (N. T. 235); would permit other employees to become five and, in one case, seven months behind (N. T. 223); and had never cited any

9. Using Coleman's standard for dues payment the following employees were permitted to pay less than the amount that was due: McClosky—paid three months on February 20, 1956, when four months were due (N. T. 211); Connelly—paid two months on April 7, 1956 when four months were due (N. T. 210-211); Fimple—paid two months on August 31, 1956, when seven months were due (N. T. 211); DiBacco—paid one month on April 7, 1956 when four months were due (N. T. 213).

other employee, except Brady, for discharge, or even taken action against any other employee to enforce dues payment (N. T. 227, 228).

On the other hand, Coleman cited Brady for discharge on March 3, 1956, eight days after the final day set for payment in the bulletin board notice—February 25, 1966 (Exhibit P-66), a notice which listed Brady as two months delinquent, whereas he was only one. He rejected at least five tenders from Brady of dues at the $3.00 rate (N. T. 234). He refused to accept Brady's dues unless they were the exact amount due (N. T. 245-230). He rejected Brady's tender of $10.50 on March 27, 1956, although he knew it was intended as payment of dues (N. T. 244). Instead of accepting the $10.50 and applying it to Brady's dues delinquency, Coleman called Miller in Kansas City, Missouri, to find out what to do (N. T. 249). As a result of that conversation, Brady's tender was refused and his membership in the union cancelled. His discharge followed.

After Brady's discharge, he pleaded with the I. A. M. and T. W. A. to reconsider, but they both refused, even though the facts of the discrimination and the illegality of the discharge were related to them by Brady.

For instance, Brady after the discharge, on May 17, 1956, sent a telegram to Miller to ask if Brady had any recourse under the I. A. M. Constitution. Miller replied only that the decision of the Systems Board was final and binding.

On June 7, 1956, Brady had his attorney at that time write the I. A. M. and T. W. A. to request reinstatement, pointing out the illegality of the discharge, but both the I. A. M. and T. W. A. refused to act (Exhibit P-76).

On October 18, 1956, Brady wrote to D. W. Harris, Vice President, Industrial Relations, T. W. A., to point out the wrongful acts of the I. A. M. in securing his dis-

charge, but to no avail (Exhibit P-68, which is set forth at footnote 13 of Brady's Petition for Writ of Certiorari because it is missing from the record).

On February 4, 1957 Brady wrote to each member of the Systems Board and the International President of the I. A. M. to point out the wrongful acts committed by the I. A. M. and to request reconsideration, but to no avail (Exhibit P-75).

It was only after these exhaustive attempts to secure reconsideration of his discharge failed, that Brady started suit in the Federal Court.

Federal question jurisdiction exists. Brady has alleged in his Complaint, as amended, and has proven that the I. A. M. hostilely and in bad faith discriminated against him causing his discharge in violation of the Railway Labor Act, 45 U. S. C. A. Sec. 152 (Eleventh). Further, because Brady was discharged in violation of Sec. 2 (Eleventh) of the Railway Labor Act, the discharge was also a violation of Sec. 2 (Fourth) of that Act. Lastly, Brady's action attacks the validity of the union security provisions of the T. W. A.-I. A. M. Bargaining Agreement and the I. A. M. Constitution under the Railway Labor Act, 45 U. S. C. A., Sec. 152 (Eleventh) and (Fourth).

The Court of Appeals held that the I. A. M. and T. W. A. had violated the Railway Labor Act by discharging Brady for reasons other than non-payment of dues, and ordered that Brady be reinstated with full benefits to his employment with T. W. A. and to membership in the I. A. M., and that both defendants pay Brady a total of $10,617.80 in back wages. (*Brady v. T. W. A., et al.*, Appendix B of the Petitions of the I. A. M. and T. W. A. p. 6a).

We submit that the decision of the Court of Appeals was correct in finding Federal jurisdiction existed over the subject matter of Brady's claim and awarding the relief that it did.

However, Brady submits that the Court of Appeals should have gone further and granted Brady a new trial to prove before a jury punitive and compensatory damages suffered by reason of the mental anguish he and his wife have endured to secure reinstatement to his rightful job.

For instance, Brady was out of work for 495 days after his discharge. He has paid approximately $4,600 in court costs alone over these twelve years of litigation. He has had to pay the cost of substantial medical expenses for his wife who developed cancer, expenses which would have been covered by T. W. A.'s employee medical policy. Clearly $10,617.80 in damages does not make Brady whole.

This issue is covered in Brady's Petition for Writ of Certiorari, No. 735.

ARGUMENT.

I. Reasons for Denying the Petition Filed by the I. A. M.

A. The Decision of the Court of Appeals That the Airlines Systems Board of Adjustment Did Not Have Jurisdiction to Consider a Controversy Between an Employee and His Bargaining Agent, Where Only Incidental Interpretation of the Bargaining Agreement Is Involved, Does Not Conflict With the Decisions of This Court or the Decisions of Other Courts of Appeals.

Section 204 of the Railway Labor Act [10] sets forth the jurisdiction of the Airlines Systems Board of Adjustment, as follows:

> ". . . disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . may be referred by petition of the parties or by either party to an appropriate adjustment board . . ."

Brady alleged in his complaint and has proven at trial facts establishing that representatives of the I. A. M., his bargaining agent, hostilely and in bad faith discriminated against him to have him discharged from his employment with T. W. A. Specifically, representatives of the I. A. M. arbitrarily refused a valid tender of dues (which tender was requested by representatives of the I. A. M.); they terminated without cause his membership in the union; they cited him for discharge after they knew he had made a valid tender of dues; and, then, they inten-

10. 45 USCA § 184.

tionally misrepresented essential facts at two systems board of adjustment hearings to secure affirmance of their unlawful discharge action in an attempt to make it final and binding on Brady. But for the discriminatory acts of the I. A. M., Brady would still be employed with T. W. A.

T. W. A. was not a party to the I. A. M.'s discriminatory acts which took place prior to and during the Systems Board hearing, and which resulted in Brady's discharge. However, T. W. A. by law is liable to Brady for the unlawful discharge action and is an essential party to these proceedings to enable Brady to obtain complete relief, i.e., reinstatement to his employment, which the I. A. M. cannot grant.[11]

Since Brady's controversy is primarily with the I. A. M., his bargaining agent, not T. W. A., his employer, the systems Board of Adjustment did not have jurisdiction in the first instance over the subject matter of Brady's claim. See *Conley v. Gibson,* 355 U. S. 41 (1957), where this Court stated:

> "But ¶ 3 First (i) by its own terms applies only to disputes between an employee or group of employees and a carrier or carriers. This case involves no dispute between employee and employer but to the contrary, is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. The Adjustment Board has no power under paragraph 3 First (i) or any

11. *Cunningham v. Erie RR,* 358 F. 2d 640, 645 (2 Cir. 1966). See also the Note at 76 Yale L. J. 210 (1966).

Brady claims in his Cross-Petition for Certiorari that TWA after learning of the IAM's discriminatory acts, in October of 1956, six months after the discharge, had an obligation to cancel the discharge, and because they failed to do so, should be held accountable to Brady (with the IAM) for the suffering and legal expenses he has incurred over these twelve years to secure reinstatement (see Exhibit P-68 set forth in footnote 13 of Brady's Petition No. 735 October Term 1968).

other provision of the Act to protect them against such discrimination."

The I. A. M. has not questioned Brady's claim that his controversy is primarily with the I. A. M., his bargaining representative. Instead, the I. A. M. argues that because resolution of Brady's controversy with the I. A. M. focused upon the interpretation to be given to the union security provisions of T. W. A.-I. A. M. Bargaining Agreement, the Systems Board of Adjustment had jurisdiction.

This argument by the I. A. M. is totally without merit. It was rejected by the District Court and the Court of Appeals, and for good reason. Brady's membership in the Union was not cancelled because of any interpretation given to the union security provisions of the T. W. A.-I. A. M. Bargaining Agreement. On the contrary, Brady's membership in the I. A. M. and his discharge were accomplished by virtue of the interpretation given by the I. A. M. to the automatic cancellation provision of the I. A. M.'s Constitution, Article E, Section 14, which interpretation completely ignored the union security provision of the Bargaining Agreement.

The I. A. M. only used the Bargaining Agreement to accomplish its unlawful purpose—to get rid of Brady and make it stick.

The Union security provision of the T. W. A.-I. A. M. Bargaining Agreement, Article XXVI(a) provided:

". . . membership in good standing in the Union shall consist of payment by the employee of dues for each calendar month, no later than the last day of the following calendar month, . . ."

On the other hand, the automatic cancellation provision of the I. A. M. Constitution, Article E, Sec. 14, provided:

> "Sec. 14. Delinquency for three months in the payment of dues or assessments shall automatically cancel membership and all rights, privileges and benefits incident thereto. The period of good standing membership of members whose membership has been cancelled for delinquency, or other cause shall date from their last reinstatment as shown by the G. L. records and their rights, privileges and benefits under the provisions of this Constitution shall attach and date from their last reinstatement, as though they had never before held membership in the I. A. M."

These provisions are qutie clear when read together and do not raise a question of interpretation, except incidentally. Brady's dues were paid up through November of 1955. Therefore, under the above provision, Brady's December dues were due by the end of January, his January dues were due by the end of February, and his February dues were due by the end of March. When Brady paid three months dues on March 27, 1956, in response to a union demand that *dues* be paid by March 28, he was only two months behind and his payment eliminated all delinquencies, and the District Court, and the Court of Appeals, so held.

Nevertheless, the I. A. M. continued to insist that Brady was delinquent in the payment of dues, not under the Union security provisions of the T. W. A.-I. A. M. Bargaining Agreement, but under the automatic cancellation provision of the I. A. M. Constitution, Article E, Section 14, taking the position that dues were payable at the beginning of the month under Article E, Section 14, not at the end of the following month, as provided in the Bargaining Agreement.

Therefore, the I. A. M. conveniently attempted to remove the controversy from an employee-union dispute to

one involving the employer, by citing Brady for discharge, rather than attempting to resolve the dispute as to the interpretation to be given the automatic cancellation provision of the I. A. M. Constitution, Article E, Section 14, by internal union adjustment.

The Systems Board of Adjustment, consisting of two representatives of the Union and two representatives of the employer, was therefore asked to interpret a provision of the I. A. M. Constitution in a dispute between an employee and his bargaining representative, and had to accept the I. A. M. interpretation even though it conflicted with the clear provisions of the Bargaining Agreement.[12]

This is the very reason that the statutory jurisdiction of the Systems Board of Adjustment is limited to disputes involving the employee and his employer and, further, it is the reason this Court and other Courts of Appeals have consistently ruled that controversies involving the employee and his bargaining representative should not be resolved through a Systems Board of Adjustment proceeding where, as here, only incidental interpretation of the Bargaining Agreement is involved.

In this regard, the statement of the District Court is very much to the point:

> "It is simply repugnant to our standards of fundamental fairness and totally unrealistic to require an employee to submit a dispute he has with his bargaining agent for final determination to persons selected by and representing the bargaining representative." [13]

---

12. See Exhibit P-1, page 26, where Woodling, a TWA member of the Systems Board questioned Miller how a three month delinquency had occurred under Article XXVI(a) of the Bargaining Agreement, and Miller referred to Article E, Sec. 14, of the IAM Constitution and explained that dues were payable at the beginning of the month, not the end of the following month.

13. *Brady v. I. A. M., et al.*, 167 F. Supp. at 472.

Therefore, the cases cited by the I. A. M. under I A (pages 13-18) of its Petition are totally inapplicable. In fact, the case of *Alabaugh v. Baltimore & Ohio R. Co.*, 222 F. 2d 861 (Fourth Cir. 1955), cert. den. 250 U. S. 839 was modified by the same court in *Thompson v. Brotherhood of Sleeping Car Porters,* 316 F. 2d 191 (1963) to recognize that a Systems Board of Adjustment did not have jurisdiction in controversies between the employee and his bargaining representative, where hostile discrimination is alleged, citing among others as authority therefor in footnote 15 at page 198, the cases of *Conley, Cunningham,* and the *Brady* cases out of the District Court.

Therefore, the Court of Appeals was correct in ruling that the Systems Board of Adjustment did not have jurisdiction to consider Brady's controversy with his bargaining representative, the I. A. M., and the fact that incidental interpretation of the Bargaining Agreement is involved does not create such jurisdiction. *Conley v. Gibson,* 355 U. S. 41 (1957).

B. The Holding of the Court of Appeals That the Claim of Hostile and Bad Faith Discrimination in the Complaint Raises a Federal Question, Does Not Conflict With Decisions of This Court or the Decisions of Other Courts of Appeals.

The Court of Appeals ruled that Brady set forth in his Complaint, as amended,

> "Allegations of 'willful and deliberate' discrimination by the I. A. M."

This finding is supported by the allegations of Brady's Complaint, as amended, wherein Brady asserted that the I. A. M. subjected Brady to dues enforcement proceedings (after he had paid dues) not accorded other employees, knowingly misrepresented to the Systems Board of Adjustment that Brady had not paid dues, and deliberately lied to the Board

by changing the content of a letter which Miller read to the Board.

These allegations of deliberate and willful discrimination to secure Brady's discharge in violation of the I. A. M.'s statutory duty to represent him fairly, vest the Federal Court with federal question jurisdiction. *Conley v. Gibson,* 355 U. S. 41 (1957); *Vaca v. Sipes,* 386 U. S. 171 (1967); *Humphrey v. Moore,* 375 U. S. 335 (1964); *Ford Motor Co. v. Huffman,* 345 U. S. 330 (1953); *Rumbaugh v. Winifrede R. R.,* 331 F. 2d 530 (4th Cir.) cert. den. 371 U. S. 929 (1964); *Thompson v. Brotherhood of Sleeping Car Porters* 316 F. 2d 191 (4th Cir. 1953); *Cunningham v. Erie R. R.* 266 F. 2d 411 (2 Cir. 1959); *Noble v. Woodward,* 200 F. Supp. 785 (E. D. Pa. 1962).

Further, Brady has alleged and proven that his discharge was unlawful and in violation of the Railway Labor Act, 45 USCA Sec. 152 (Eleventh). Therefore, since Brady was discharged for reasons other than non-payment of dues, Section 2 (Fourth), of the Railway Labor Act (45 USCA Sec. 152 (Fourth)), was also violated. Coercion having been found by virtue of the violation of 2 (Fourth), the intent to coerce is presumed (*Radio Off. Union of the Comm. Telegraphers Union, AFL v. NLRB,* 347 U. S. 17, 44-45) and T. W. A. under these circumstances is held to be strictly liable. *Cunningham v. Erie Railroad Co.,* 358 F. 2d 640 (2nd Cir. 1966); see also the Note "Dues Disputes under the Railway Labor Act", Vol. 76 of the Yale Law Journal, page 210, 214 (1966).

Lastly, there exists a third basis for federal question jurisdiction. Brady has alleged and proven that the automatic cancellation provision of the I. A. M. Constitution, Article E, Sec. 14, as interpreted by the I. A. M., when read in conjunction with the clear union security provisions of the Bargaining Agreement, was ambiguous and created a

double standard for dues enforcement; and, therefore, violates the Railway Labor Act, 45 USCA 154 (Eleventh).[14]

For instance, Clifford Miller, General Chairman, District 142, of the I. A. M., had sent a letter demand to Brady on March 13, 1956, informing him that if he did not pay dues by March 28, 1956, he would be discharged from his employment (Exhibit P-3). On March 27, 1956, Brady tendered his check, in the amount of $10.50 together with his dues book, to Gerald C. Coleman, Financial Secretary of Local 1776, District 142 of the I. A. M. (N. T. 242-243). Brady's tender was sufficient to enable him to maintain his membership with the I. A. M. in good standing under Article XXVI(a), and eliminate his prior delinquency—and the District Court and the Court of Appeals so held.

Coleman, on instructions from Miller, rejected Brady's tender of March 27, 1956, and invoked the automatic cancellation provisions of Article E, Sec. 14, demanding, in addition to the three months dues, which Brady had already paid, a reinstatement fee (Exhibit P-4) (N. T. 257-259). Miller testified that he felt dues were payable on the first day of the month under Article E, Sec. 14 (N. T. 389).

Therefore, the automatic cancellation provision of Article E, Sec. 14 of the I. A. M. Constitution as enforced by Miller created a double standard for dues enforcement. Miller was able to demand dues under Article XXVI(a), Exhibit P-3 (and then in an improper amount[15]) and when Brady paid[16] sufficient dues (N. T. 242-243), was able to

14. *Brady v. T. W. A., et al.*, 174 F. Supp. 360, 365.

15. Miller demanded dues through March, 1956. Under the terms of Article XXVI(a), March dues were not payable until May 31, 1956.

16. Brady tendered his check for $10.50, which under Article XXVI(n), amounted to payment. "(n) . . . The condition of payment shall be met if the amount due is tendered to the Local Lodge Financial Secretary of the Union in person or is mailed to him within the prescribed time limits, and such secretary refuses to accept such tender."

reject such payment and proceed to demand a reinstatement fee (Exhibits P-4 and P-14), payment of which would have caused forfeiture of seniority (Exhibit P-7) (N. T. 308), and non-payment of which resulted in discharge (Exhibit P-70). The ambiguity created by the I. A. M.'s interpretation of the I. A. M. Constitution, as applied to Brady's circumstances, not only eliminated jurisdiction of the Systems Board of Adjustment, but caused federal question jurisdiction to be vested in the District Court. See *Cunningham v. Erie R. Co.*, 266 F. 2d 411, 416 (1959):

> "Moreover, Cunningham is also claiming violations of the specific requirements of the Railway Labor Act: (1) dismissal only for non-payment of dues, and (2) dues uniformly required.
>
> "The allegations and the proof demonstrate that what Cunningham is doing in this action is questioning the validity of the collective bargaining agreement as applied to the circumstances of his dismissal, rather than the 'interpretation or application' of the agreement. Hence, *Alabaugh* to the contrary notwithstanding, we conclude that the Adjustment Board had no statutory authority to decide the dispute, and that the district court was competent to proceed against the union, against which Cunningham leveled the charge of discrimination, in violation of the express or implied duty under the terms of the collective bargaining agreement to represent him fairly and impartially."

Therefore, the Court of Appeals' decision that the District Court had subject matter jurisdiction over Brady's suit was correct in view of the allegations in the Complaint, as amended, of hostile discrimination, the alleged violation of Section 2(Fourth) (Eleventh) of the Railway Labor Act, 45 USCA 152 (Fourth) and (Eleventh), and of the

asserted invalidity of the union security provisions under the Railway Labor Act of the I. A. M. Constitution, Article E, Section 14, as applied to Brady's circumstances.

C. The Decision of the Court of Appeals That Brady Who Was Caused to Be Discharged From His Employment by the I. A. M. in Violation of the Railway Labor Act Was Not Required to Exhaust Internal Union Remedies Before Seeking Reinstatement to Membership in the Union and to His Employment in the Federal Courts Does Not Conflict With Decisions of Other Courts of Appeals.

The I. A. M. argues that Brady is barred from seeking reinstatement to membership in the Union and to his employment with T. W. A. in the Federal Court because he did not exhaust internal union appellate remedies, which the I. A. M. claim were available to him. The I. A. M. in making this argument ignores completely the very unfortunate fact that they were not satisfied merely to cancel Brady's membership in the Union. They went further, and had him discharged.

When they had him discharged, the legality of the dues increase (on which issue Brady capitulated) was no longer the center of the dispute. The controversy then focused on the legality of the discharge.

The cases cited by the I. A. M. at pages 19 and 20 of its Brief do not involve union security discharge situations; and, therefore, are not applicable to Brady's case. It is one thing to require an employee who has not been discharged to exhaust union remedies before he sues his union. But it is quite different to apply the same standard to an employee who has been caused to be discharged by his union.

Further, Brady was never given an opportunity by the I. A. M. to exhaust internal appellate union procedures to dispute the I. A. M.'s interpretation of the automatic cancellation provision of the I. A. M. Constitution. Miller's March 13, 1956, letter (Exhibit P-3) gave Brady 15 days to pay dues or be discharged. Brady did pay dues as required under the T. W. A.-I. A. M. Bargaining Agreement, but his tender was rejected by the I. A. M. The I. A. M.'s March 28, 1956, letter (Exhibit P-4) gave him four days to pay the same dues he had already paid, plus a reinstatement fee, or be discharged. And the I. A. M.'s April 11, 1956, letter gave him 15 days to pay a reinstatement fee or be discharged.

The I. A. M. Constitution provides that appeals from the decision of a local I. A. M. representative may be taken to the International President within thirty days of the decision. Brady was first cited for discharge within twelve days of the I. A. M.'s March 28, 1956, letter, the date that Brady was first notified that this membership in the union had been cancelled.

Not once did the I. A. M. inform Brady that his membership had been cancelled under the I. A. M. Constitution, and that under the appeals provision of the Constitution he had thirty days to appeal to the International President. On the contrary, the I. A. M. was always acting under the T. W. A.-I. A. M. Bargaining Agreement in order to secure his discharge from his employment. Once he had been cited for discharge, and that discharge acted upon, he had no alternative under his T. W. A.-I. A. M. Agreement but to appeal to the Systems Board of Adjustment, if he wanted to maintain his employment with T. W. A., which he did.

To say, as the I. A. M. does, that Brady voluntarily appealed his proposed discharge to the Systems Board of Adjustment, as he was not required to do so because he had

other remedies, is totally without merit. The T. W. A.-I. A. M. Bargaining Agreement is quite clear and leaves no doubt as to the remedies of an employee who is discharged. He must appeal that discharge within three days, or it will be deemed final and binding under the provisions of the Bargaining Agreement.

As the Court of Appeals held (Appendix B of Petition, p. 6a):

> "The doctrine (Exhaustion of Internal Remedies), relied on by IAM, applies to situations unlike the present one, which concern wholly internal union matters. The present dispute focuses on the employment relationship rather than the union relationship. Furthermore, Mr. Brady is seeking reinstatement in his employment, a remedy that is unavailable to him within the internal union procedures. These reasons justified the District Court in determining that Mr. Brady was not required to exhaust his internal union remedies before bringing suit against the IAM for violation of Section 2 (Fourth) (Eleventh)."

The case of *Gainey v. Brotherhood of Railway and Steamship Clerks, et al.*, 275 F. 2d 342 (3rd Cir. 1960), cited by the I. A. M. at page 20 of its Petition, is not authority to the contrary. The circumstances of the *Gainey* case, *supra*, are entirely different from the circumstances that faced Brady. *Gainey* did not involve a union security discharge, but involved only a question of whether or not the union had taken the necessary steps to compel the railroad to abide by the terms of a new agreement that had been negotiated between the Union and the Railroad.

D. The Court of Appeals Was Correct in Finding That the Complaint as Amended Raised the Issue of Hostile and Bad Faith Discrimination.

The I. A. M. at page 23 of its Petition again asserts that Brady did not allege "hostile and bad faith discrimination" in its complaint, as amended, and did not notify the I. A. M. that he had been mistrated until 18 months after litigation had started. Therefore, the discrimination charge was an after thought and without substance. This is just not the case.

Brady, in paragraph 12 of his complaint, as amended, alleged that Miller knowingly misrepresented to the Systems Board of Adjustment that Brady had not paid dues, that Miller knowingly represented that Brady on March 3, 1956 was asked to pay a reinstatement fee, and that Miller lied to the Systems Board when he misread the letter of March 28, 1956, sent by Coleman to Brady.

In paragrpah 20, Brady alleges acts of discrimination, and in paragraph 23 alleges that these acts of discrimination were "wilful and deliberate on the part of the I. A. M."

In addition, Brady, on April 18, 1956, pointed out to Miller that another member of the local was four months behind in paying dues and had not been cited for discharge (Exhibit P-63). On October 28, 1956, Brady, after he first reviewed the transcripts of the two systems board hearings, wrote to D. W. Harris, Vice President, Industrial Relations, T. W. A., to point out the misstatements of fact made by Miller at the Systems Board Hearing. Also, on February 2, 1957, well before suit was instituted against the I. A. M. and T. W. A. for unlawful discharge, Brady wrote to each member of the Systems Board, and to the I. A. M. International President. So both the I. A. M. and T. W. A. had clear notice of Brady's claim long before suit

was started, but they did nothing to right the wrong committed against Brady.

E. The Court of Appeals Decision Does Not Err in Any Substantial or Important Respect.

The argument of the I. A. M. at pages 25-27 of its Petition that Brady was subject to discharge under the I. A. M. Constution and I. A. M.-T. W. A. Bargaining Agreement was refuted by the District Court and the Court of Appeals, and, therefore, because the facts established beyond question that Brady paid dues in time to maintain his membership with the union in good standing, there is no reason to belabor the point further.

However, the I. A. M. goes further and argues that Brady should have no complaint for being cited for discharge under the Bargaining Agreement since he violated the 60 day provision of that Agreement by failing to pay dues for December, 1955 and January, 1956, by the end of February, 1956.

Thus, the I. A. M., by its assumption, implies that the T. W. A.-I. A. M. Bargaining Agreement sets up a different standard for dues enforcement than the I. A. M. Constitution. A similar argument was made before the District Court on April 21, 1958, by I. A. M. counsel, and the District Court asked counsel whether or not such an interpretation violated the Railway Labor Act, 45 USCA 152 (Eleventh), vesting subject matter jurisdiction in the Federal Court. The I. A. M. responded to the Court's question by announcing that its prior argument on this point was in error, and agreed that there was no difference between Article XXVI(a) of the Bargaining Agreement and Article E, Sec. 14 of the I. A. M. Constitution, stating:

> "Upon consideration of the point raised in the Court's February 4th letter, the language of the entire Article XXVI(a), and the record of the proceedings before the Systems Board of Adjustment, counsel believes that he was in error stating during the April 21 argument that there is any difference between Article XXVI(a) and Article E, Section 14 of the I. A. M. Constitution." [17]

So, the I. A. M. now assumes for purposes of argument before this Court a position that they retracted back in the District Court in April of 1958, when they felt that the District Court would affirm that jurisdiction existed upon the fact that the dues enforcement provisions contained in the Bargaining Agreement and the I. A. M. Constitution were not uniform and violated the Railway Labor Act.

This emphasizes even more the frustration that Brady has gone through over these 12 years of litigation to obtain reinstatement to his employment with T. W. A. and damages that have resulted from his unlawful discharge, a discharge which would not have occurred in the first place if Brady had been given notice of his responsibilities under the I. A. M. Constitution, rather than receiving arbitrary demands from the representatives of the I. A. M. as Bargaining Agent, first demanding dues, then dues and a reinstatement fee, then only a reinstatement fee, and finally having him discharged.

The time has come to end the litigation and return Brady to the employment and benefits he would have had but for the unlawful discharge. Two District Court Judges involving six reported (and one memorandum) opinions and the Court of Appeals have considered and rejected

17. *Brady v. I. A. M., et al.*, 174 F. Supp. 360, 366 (1959).

all of the arguments made by the I. A. M. over the last 12 years.

II. Reasons for Denying the Petition Filed by T. W. A.

The Court of Appeals was correct in holding that T. W. A. was subject to Automatic Liability by Virtue of the Unlawful discharge.

The cases deciding union security actions by employees have uniformly held that the employer, although only incidentally involved, is a party and may be compelled to respond in damages to the injured employee. *Richardson v. Texas & New Orleans Railroad Co.*, 242 F. 2d 230 (5th Cir. 1957); *Nobile v. W. B. Woodward, Jr., et al.*, 200 F. Supp. 785 (Ed. Pa. 1962); *Cunningham v. Erie R. Co.*, 358 F. 2d 640 (2d Cir. 1966).

In the *Richardson* case, *supra*, at page 236 the Fifth Circuit held:

> "It takes two parties to reach an agreement, and both have a legal obligation not to make or enforce an agreement or discriminatory employment practice which they either know, or should know, is unlawful. Unless financial responsibility for a joint breach of such duty is required from both sides of the bargaining table, the statutory policy applied under *Steele* will be impractical of enforcement. For the foregoing reasons, we think the Brotherhood's obligation under this statute does not exist in vacuo, unsupported by any commensurate duty on the part of the carrier.
>
> "The Railroad may not have been the Brotherhood's keeper for bargaining purposes, but we think that under the allegations of this complaint, it can be required to respond to damages for breach of its own duty not to join in causing or perpetrating a violation of the Act and that policy which it is supposed to effectuate."

Finally, in the *Cunningham* case, *supra,* 358 F. 2d 640, 645 (1966) this court stated:

> "Once it is established, as here, that the expulsion of the worker from membership in the union was the product of an act of 'hostile discrimination' by the union, that is to say, 'for any reason other than the failure of the employee to tender the periodic dues . . . *uniformly required* as a condition of acquiring or retaining membership' 45 U. S. C. Sec. 152 (Eleventh)(a) (Emphasis Added), the Railroad, having discharged the employee on the representation of the union that he had failed to tender such periodic dues, uniformly required, is automatically liable for wrongful discharge. See Brady v. Trans World Airlines, D. C. Del. 1963, 223 F. Supp. 361. This is because the limited protection afforded by the Railway Labor Act is no longer available as a defense. See 45 U. S. C. Sec. 152 (Eleventh)(d) and (Fourth)."

Accordingly, we submit that the Court of Appeals was correct in finding joint liability against T. W. A. and the I. A. M. for reinstatement into the union and to his prior employment, plus damages for lost wages and lost benefits.

CONCLUSION.

For the foregoing reasons, the Petitions for a Writ of Certiorari filed by the I. A. M. and T. W. A. should be denied.

Respectfully submitted,

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 735

VINCENT P. BRADY, *Cross-Petitioner,*

v.

TRANS WORLD AIRLINES, INC., *Respondent,*

and

THE INTERNATIONAL ASSOCIATION OF MACHINISTS, *Respondent.*

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT INTERNATIONAL ASSOCIATION OF MACHINISTS IN OPPOSITION

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December, 1968

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Argument	9
Conclusion	12

CITATIONS

CASES:

Brady v. *TWA et al.*, 223 F. Supp. (D.C. Del., 1963)	7
Cunningham v. *Erie R. Co.*, 358 F. 2d 640 (3d Cir., 1966)	10
Fagan v. *Pennsylvania R. Co.*, 173 F. Supp. 465, 474 (M.D. Penna., 1959)	9
IAM v. *Friedman*, 252 F. 2d 846, *cert. den.* 357 U.S. 926 (1958)	9
Long Island City Lodge 2147, et al. v. *Railway Express Agency et al.*, 217 F. Supp. 907, 909 (S.D. N.Y., 1963)	10
Martin v. *Kansas City Southern R. Co.*, 197 F. Supp. 188, 192, 193 (W.D. La., 1961)	9
Neal v. *System Board of Adjustment*, 348 F. 2d 722 (8th Cir., 1965)	9
Richardson v. *Texas & New Orleans R. Co.*, 242 F. 2d 230 (5th Cir., 1957)	10

STATUTES:

Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C.A., Section 411 et seq.)	10
Section 101(a)(4)	10

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---

BRIEF FOR RESPONDENT INTERNATIONAL ASSOCIATION OF MACHINISTS IN OPPOSITION

The International Association of Machinists (IAM), a respondent in the above-entitled case, and a petitioner for a writ of certiorari in Case No. 712, involving the same litigation, submits this brief in opposition to the cross-petition of Vincent P. Brady for a

writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix B to the IAM petition in Case No. 712, is not yet reported. Decisions of the District Court are reproduced in Appendix D to the IAM petition in Case No. 712 and are reported as there indicated.

JURISDICTION

The jurisdictional requisites are adequately set forth in the cross-petition.

QUESTION PRESENTED

In the opinion of the respondent IAM, the cross-petition presents the question of whether the Court of Appeals erred in holding, after a trial on the merits showing no unfair union action, that cross-petitioner Brady, a shop steward knowledgeable of appellate union procedures, was required to invoke fair and adequate internal procedures of the IAM to redress asserted unfair action against him by local and district IAM officers as a condition precedent to his recovery on allegations that the IAM had violated its duty to him of fair representation.

STATUTES INVOLVED

The statutory provisions involved are Section 2, First; Section 2, Fourth; Section 2, Fifth; Section 2, Seventh; Section 2, 11th; and Section 204 of the Railway Labor Act (45 U.S.C.A., Section 152, First; Fourth; Fifth; Seventh; Eleventh; and Section 184). These statutory provisions are set forth in full in Appendix A to the IAM petition in Case No. 712.

STATEMENT

A statement of the case is set forth at pages 5-13 of the IAM petition in Case No. 712. A review of that statement and the record references will show many inaccuracies in the statement contained in the cross-petition. Certain additional comments are also required.

The cross-petition deals with the claim of Mr. Brady that local officers of the IAM treated him unfairly in demanding a reinstatement fee from him in order to maintain his good standing membership in the IAM and, hence, violated the duty of fair representation owed to him and the disposition by the Court of Appeals of this claim.

Mr. Brady's claim was not made until the filing of the Second Amended Complaint in the District Court on December 1, 1958, more than three years after the beginning of the controversy involved, the substance of which was that Mr. Brady had been treated unfairly in that other employees of Trans World Airlines, Inc. (TWA), equally delinquent in their dues payments had not been cited to TWA pursuant to the union security provisions of the IAM-TWA collective bargaining agreement. (R. 51)[1] This count of the amended complaint was directed solely at IAM and asked for damages only against IAM in connection with the claim. Thus, the statement in the cross-petition (page 2) to the effect that the union and employer joined in an "unholy alliance against an in-

[1] Reference is to pages of the printed Joint Appendix of IAM and TWA in the Court of Appeals, a certified copy of which is before the Court as a part of the record in connection with the IAM petition in Case No. 712 and the TWA petition in Case No. 713.

dividual employee" is a purely gratuitous statement without foundation in the record.

The statement in the cross-petition is equally fallacious in stating that IAM branded Mr. Brady as a troublemaker because of his opposition to a dues increase in the local lodge and caused his discharge for this reason. The fact is that the record shows that the dues increase was voted by the membership of the local lodge and no officer of the IAM was involved (R. 234, 348). No officer of the IAM was even aware of Mr. Brady's opposition to the dues increase until Mr. Brady made a written protest on February 9, 1956, to Mr. A. J. Hayes, then IAM president (R. 150, 352-356). On that date, Mr. Brady was already more than two months in arrears in the payment of his dues. Mr. Brady received a prompt and courteous reply to this protest (R. 255, 256), affirming the validity of the local lodge action. Thereafter, Mr. Brady did not make any appeal to the Executive Council of the IAM concerning the dues increase.

At no time did Mr. Brady ever raise with *any* officer of the IAM the question of the validity of General Chairman Miller's request for a reinstatement fee as a condition of his retaining his IAM membership.

Mr. Coleman, the Financial Secretary-Treasurer of the local lodge, who requested General Chairman Miller to cite Mr. Brady for violation of the union security provisions of the collective bargaining agreement, did not hold that position in November 1955 when the dues controversy arose in the local lodge and was in no way involved in the controversy (R. 182-184). He did not become Financial Secretary-Treasurer of Local Lodge 1776 until January 1956

(R. 185). Thereafter, he sought the same amount of dues from Mr. Brady for each month that he sought from everyone else and Mr. Brady refused (R. 185, 186, 234, 357).

Mr. Miller, General Chairman of the District Lodge of which Local Lodge 1776 was a part (R. 202, 203), was not even aware of Mr. Brady's continued opposition to the payment of the increased dues and his refusal to do so until he ran into Mr. Brady at the Philadelphia Airport on or about March 13, 1956. He then advised Mr. Brady to pay the dues under protest and process his protest through IAM channels (R. 205). He did not do this. Nor did Mr. Brady at any time suggest to anyone that he had been discriminated against by the local officers of the IAM prior to the time he filed his Second Amended Complaint on December 1, 1958. He made no such claim when he refused to pay a reinstatement fee to Mr. Miller (Exhibit P-19). Nor did Mr. Brady subsequently advance any such claim to the System Board of Adjustment set up pursuant to Section 204 of the Railway Labor Act (45 U.S.C.A., Section 184) to interpret and apply the IAM-TWA collective bargaining agreement including its union security provisions (Exhibit D-3). Such a claim was also not included in the original complaint filed on April 22, 1957, which was interpreted by the District Court as constituting "little more than an action sounding ex delicto or ex contractu" (Appendix D to IAM petition in Case No. 712, 64a). It was not until after this point that the amendment alleging discrimination by the IAM was filed.

Thereafter, a full trial on the question of liability was conducted by the District Court at which time Mr.

Brady had the opportunity to present all evidence relating to his claim that the IAM had discriminated against him. The following facts of record completely negate any inference of hostile discrimination or ill will by the IAM or any of its officers against Mr. Brady:

1. At the time Mr. Coleman, Financial Secretary-Treasurer of Lodge 1776, referred Mr. Brady's dues delinquency to the District Lodge for action by General Chairman Miller, Mr. Brady was the *only* member of Lodge 1776 who was delinquent in the payment of his dues. Every other member had paid his dues at the increased rate determined by the lodge at its November 1955 meeting (R. 167, 186, 187).

2. Mr. Brady lost his membership in the IAM and was cited for discharge pursuant to the union security provisions of the IAM-TWA collective bargaining agreement because he alone of all the members of Local Lodge 1776 absolutely refused to pay dues at the increased rate taking the constant position that he would not pay the new rate because he did not agree that it was validly adopted (R. 167, 185-187, 198).

3. Mr. Brady was asked repeatedly by the officers of Local Lodge 1776 and by others to pay his dues. He was advised that if he objected to the validity of the dues increase the proper procedure was to pay the dues under protest and then prosecute his protest within the IAM (R. 137, 138, 205).

4. Mr. Brady lost his membership in the IAM on March 1, 1956, and could at that time have been

compelled to pay a reinstatement fee. However, he was given an opportunity to get himself in good standing by merely bringing his dues up to date by the payment of four months' dues by March 28, 1956, an amount of only $13.00. He refused to avail himself of this opportunity because of his own determination that at that time he need only pay three months' dues although he then owed four months' dues (December 1955 through March 1956) as dues are due and payable the first of the month (R. 93-96).

5. Mr. Brady was given a full opportunity to preserve his membership in the IAM and his employment with TWA by the payment of a reinstatement fee but he declined to do so (R. 340, 346).

6. There is absolutely no testimony from Mr. Brady or any other witness that any officer of the IAM, of District Lodge 142, or of Local Lodge 1776, or any agent of the IAM bore Mr. Brady any malice or bad feeling.

The District Court rendered its decision on November 4, 1963[2] (Appendix D to IAM petition in Case No. 712, 88a), in which that court made no finding of any hostile discrimination against Mr. Brady.

On appeal, Mr. Brady argued to the Court of Appeals that the District Court erred in not finding hostile discrimination against him and awarding punitive damages therefor. The Court of Appeals rejected Mr.

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[2] *Brady* v. *TWA, et al.*, 223 F. Supp. 361.

Brady's argument with the following finding (Appendix D to IAM petition in Case No. 712, 36a-38a):

> "In a suit alleging hostile discrimination violative of the bargaining representative's duty of fair representation, it must be proved not only that the union's actions were improper, but that they were undertaken with malice and bad faith. Mr. Brady alleges that he was accorded different treatment from other members of his lodge who were similarly deliquent in their dues payments and also that at the hearing before the Board, Mr. Miller, an IAM official, misrepresented pertinent facts. In making these allegations, Mr. Brady is not challenging his discharge from his employment, but rather the fairness and propriety of the manner in which he was treated by IAM. Such a claim involves the union-member relationship and not the employer-employee relationship.
>
> "It has been the general rule, and the rule of this circuit, that before a suit against a union for breach of its duty of fair representation may be brought in the courts, the member must first exhaust the available internal union remedies, or show an adequate reason for failing to do so. There is good reason for this rule which forestalls judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own legitimate affairs. Mr. Brady was a shop steward and that he was knowledgeable of appellate union procedures may be inferred from his letter in February 1956 to the International President of IAM and others in which he protested the manner in which the dues of his local lodge were increased. Nevertheless, there is no allegation or evidence that he invoked any appellate union procedures to redress the asserted unfair and arbitrary action against him by the local and district officers. Nor does he advance an adequate reason for his failure

> to do so. Mr. Brady's argument that it would have been futile to ask IAM to review its own dealings with him is not tenable for IAM's internal procedure provided reasonably prompt review of his contentions on union levels higher than those responsible for the decisions against him."

The Court of Appeals decision also cited the decision of the United States Court of Appeals for the District of Columbia Circuit in *IAM* v. *Friedman,* 252 F. 2d 846, *cert. den.* 357 U.S. 926 (1958), in which the Court reviewed the internal appellate procedures of the IAM and found them to be fair and adequate.

It is this finding of the Court of Appeals to which the cross-petition is directed.

ARGUMENT

The cross-petition does not raise any issue warranting review by this Court.

The portion of the Court of Appeals decision to which the cross-petition is directed does not conflict with any other Court of Appeals decision on the subject matter. To the contrary, the proposition that a union member must exhaust available internal union remedies or show an adequate reason for failing to do so as a condition precedent to recovery of damages against a union or its officers for alleged breach of a duty of fair representations has also been enunciated by other Courts of Appeals and Federal district courts. *Neal* v. *System Board of Adjustment,* 348 F. 2d 722 (8th Cir., 1965); *Fagan* v. *Pennsylvania R. Co.,* 173 F. Supp. 465, 474 (M.D. Pa., 1959); *Martin* v. *Kansas City Southern R. Co.,* 197 F. Supp. 188,

192, 193 (W.D. La., 1961); *Long Island City Lodge 2147, et al.* v. *Railway Express Agency, et al.*, 217 F. Supp. 907, 909 (S.D. N.Y., 1963).[3] Moreover, the exhaustion requirement has been specifically written into Section 101(a)(4) of the Bill of Rights of individual union members of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C.A., Section 411 (a)(4)).

The cross-petition suggests (page 21) that the Court of Appeals ruling is in conflict with the decision of the Fifth Circuit in *Richardson* v. *Texas & New Orleans R. Co.*, 242 F. 2d 230 (1957), and of the Second Circuit in *Cunningham* v. *Erie R. Co.*, 358 F. 2d 640 (1966). However, a reading of these two decisions shows that neither concerned itself with the issue here involved.

The portion of the Court of Appeals decision to which the cross-petition is addressed is not in conflict with any decision of this Court nor does the cross-petition so claim.

The cross-petition asserts that the ruling of the Court of Appeals raises an important question of Federal law. However, this decision was not made in the context of an unanswered complaint in which the allegations of the complaint as to unfair treatment were required to be taken as true. The decision was made only after a full trial on the merits which showed that there was not in fact any discrimination against Mr.

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[3] Indeed, the Court of Appeals decision on this point does not go as far as the decisions in the cited cases in dismissing complaints which fail to allege the exhaustion of internal union remedies or adequate reason for failure to do so. (See pages 19-21 of the IAM Petition in Case No. 712.)

Brady by any local IAM officer, much less by anyone connected with the International (see record citations at page 6 above) and the District Court had not found any such union action.

The cross-petition also argues (page 22) that the Court of Appeals erred because Mr. Brady was never advised that he could appeal the validity within the IAM of the request from local officials for a reinstatement fee. The Court of Appeals decision finds, however, that Mr. Brady was a shop steward and that he was knowledgeable in appellate union procedures (page 8 above).

The cross-petition also argues (pages 24 and 25) that Mr. Brady could not utilize any internal union remedies because of the necessity to appeal his citation to the System Board of Adjustment. The Court of Appeals found that such an appeal would not have been futile (page 8 above). Moreover, Mr. Brady had a period of approximately 20 days between the time he was requested to pay a reinstatement fee (April 11, 1956) or be cited for violation of the union security provisions of the IAM-TWA collective bargaining agreement and the date on which he was cited to TWA (May 1, 1956) as being in violation of such provisions. This gave him ample time and opportunity to initiate an internal appeal of the validity of the request to him for a reinstatement fee and to ask that the union take no further action until his IAM appeal procedures had been exhausted. He did none of these things (Exhibit P-14). Instead, Mr. Brady promptly refused to pay the reinstatement fee and made an appeal to the System Board of Adjustment without even having been cited to that Board (Exhibit P-19; Exhibit D-3).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

BRUCE M. STARGATT
Suite 1401 Bank of Delaware Building
Wilmington, Delaware

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington, D. C.

Counsel for Respondent

Of Counsel:

YOUNG, CONAWAY, STARGATT & TAYLOR
Suite 1401 Bank of Delaware Building
Wilmington, Delaware

MULHOLLAND, HICKEY & LYMAN
620 Tower Building
Washington, D. C.

December, 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968.

No. 735.

VINCENT P. BRADY,
Cross-Petitioner,

against

TRANS WORLD AIRLINES, INC.,
Respondent,

and

THE INTERNATIONAL ASSOCIATION OF MACHINISTS,
Respondent.

PETITION FOR REHEARING AFTER DENIAL OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MORRIS DUANE,
1617 Land Title Building,
Philadelphia, Pennsylvania,
Counsel for Cross-Petitioner.

FRANCIS L. WHITE, JR.,
DUANE, MORRIS & HECKSCHER,
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Philadelphia, Pennsylvania,
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INDEX TO PETITION.

	Page
QUESTION PRESENTED	1
FEDERAL JURISDICTION	1
REASONS FOR RECONSIDERATION	2
a) Glover Case	2
b) Rulings of the Lower Courts on the Exhaustion Doctrine	3
c) Facts Supporting Claim That Attempts Were Made to Exhaust Administrative Remedies	5

CASES CITED.

	Page
Brady v. TWA and IAM, 196 F. Supp. 504 (1961)	3
Brady v. TWA and IAM, 223 F. Supp. 361 (1963)	4
Brady v. TWA and IAM, 401 F. 2d 87 (3rd Cir. 1968)	4
Glover v. St. Louis-San Francisco Railroad Co., et al., 37 L. W. 4084 (No. 38) October Term 1968, decided January 14, 1969	2

STATUTES CITED.

	Page
Railway Labor Act, 45 USCA § 152 (Eleventh) (Fourth)	1
Supreme Court Rule 58(2)	2

QUESTION PRESENTED.

DOES AN EMPLOYEE WHO IS UNLAWFULLY DISCHARGED FROM HIS EMPLOYMENT IN VIOLATION OF THE RAILWAY LABOR ACT ALLEGEDLY BECAUSE OF HOSTILE DISCRIMINATION INTENTIONALLY PRACTICED UPON HIM BY HIS BARGAINING REPRESENTATIVE HAVE THE RIGHT TO TRIAL BY JURY TO PROVE PUNITIVE DAMAGES, DAMAGES RESULTING FROM MENTAL ANGUISH ARISING FROM THE HUMILIATION AND EMBARRASSMENT HE SUFFERED AND LEGAL EXPENSES INCURRED IN WINNING REEMPLOYMENT, WHERE FEDERAL QUESTION JURISDICTION EXISTS, GOOD FAITH ATTEMPTS TO EXHAUST INTERNAL ADMINISTRATIVE REMEDIES WERE MADE, AND WHERE FURTHER ATTEMPTS TO EXHAUST SUCH REMEDIES WOULD HAVE BEEN FUTILE?

FEDERAL JURISDICTION.

Federal question jurisdiction exists under and by virtue of the alleged and proven violation of the Railway Labor Act, 45 USCA ¶ 152 (Fourth) and ¶ 152 (Eleventh) and the alleged hostile discrimination practiced against Mr. Brady by the I. A. M., resulting in his unlawful discharge from his employment.

REASONS FOR RECONSIDERATION.

This Court, on January 20, 1969, denied Mr. Brady's Petition for a Writ of Certiorari in No. 735, and this Petition is submitted under Rule 58(2) to request a rehearing on said denial.

Mr. Brady, on February 14, 1969, obtained an extension through March 14, 1969 to Petition for Rehearing.

a) The Glover Case.

In the case of *Glover v. St. Louis-San Francisco Railroad Co., et al.*, 37 L. W. 4084 (No. 38) October Term 1968, decided January 14, 1969, this Court held that failure to exhaust administrative remedies does not bar an employee alleging discrimination from seeking redress in the Federal Courts where attempts to exhaust administrative remedies were made and denied and further attempts to exhaust would be futile.

See *Glover v. St. Louis-San Francisco Railroad Co., et al.*, 37 L. W. at page 4086, where this Court stated in regard to the factual situation involved:

> "The circumstances of the present case call into play another of the most obvious exceptions to the exhaustion requirement—the situation where the effort to proceed formally with contractual or administrative remedies would be wholly futile. In a line of cases beginning with *Steele v. Louisville & Nashville R. Co., supra,* the Court has rejected the contention that employees alleging racial discrimination should be required to submit their controversy to "a group which is in large part chosen by the [defendants] against whom their real complaint is made." 323 U. S. at 206. And the reasons which prompted the Court to hold as it did about the inadequacy of a remedy before the Adjustment Board apply with equal force to any

> remedy administered by the union, by the company, or both, to pass on claims by the very employees whose rights they have been charged with neglecting and betraying. Here the complaint alleges in the clearest possible terms that a formal effort to pursue contractual or administrative remedies would be absolutely futile. Under these circumstances, the *attempt* to exhaust contractual remedies, required under *Maddox,* is easily satisfied by plaintiff's repeated complaints to company and union officials, and no time-consuming formalities should be demanded of them. The allegations are that the bargaining representatives of the car employese have been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race. If that is true, insistence that plaintiffs exhaust the remedies administered by the union and the railroad would only serve to prolong the deprivation of rights to which these plaintiffs according to their allegations are justly and legally entitled."

Mr. Brady did meet the test of the *Glover* case, *supra,* on the exhaustion issue. However, prior to the decision of the Court of Appeals, the exhaustion doctrine was not raised as a bar to Mr. Brady's demand for a jury trial on his action at common law. Because of the way the case progressed in the District Court much of the evidence on the exhaustion issue was never made a part of the formal record.

b) Rulings of the Lower Courts on the Exhaustion Doctrine.

In *Brady v. TWA, et al.,* 196 F. Supp. 504, 507 (1961), the District Court held as a matter of law that Mr. Brady

was not entitled to recover punitive damages, or even common law damages, under the Railway Labor Act, and, therefore, the Court would not consider evidence in this regard as relevant to the damages claimed.

In addition, the District Court found as a matter of law that the exhaustion doctrine was inapplicable to Mr. Brady's situation. *Brady v. TWA, et al.,* 223 F. Supp. 361, 370 (1963).

The United States Court of Appeals for the Third Circuit denied Mr. Brady's request for a jury trial to prove Common Law damages against the I. A. M. on the basis that Mr. Brady had not exhausted administrative remedies nor given a reason for not doing so. *Brady v. TWA,* 401 F. 2d 87, 104 (3rd Cir. 1968).

On the other hand, the Circuit Court held that the exhaustion doctrine would not bar Mr. Brady's claim for re-employment and back wages. See *Brady, supra,* 401 F. 2d at 102 where the Court stated:

> "The District Court correctly reasoned that this section 2 (Fourth) (Eleventh) phase of the case involves the legality of Mr. Brady's discharge from his employment and not the legality of IAM's dues increase. The doctrine, relied on by IAM, applies to situations unlike the present one, which concern wholly internal union matters. The present dispute focuses on the employment relationship rather than the union relationship. Furthermore, Mr. Brady is seeking reinstatement in his employment, a remedy that is unavailable to him within the internal union procedures. These reasons justified the District Court in determining that Mr. Brady was not required to exhaust his internal union remedies before bringing suit against IAM for violation of section 2 (Fourth) (Eleventh).

In effect, the Circuit Court determined, as did the District Court, that it would have been futile for Mr. Brady to exhaust internal union remedies in his effort to gain reemployment, but refused to find that it would have been just as futile for him to exhaust internal union remedies on his claim for damages at common law which resulted from the intentional interference with his employment relationship and his discharge.

The distinction raised by the Circuit Court is without foundation in fact or law, as Mr. Brady's damages for the intentional interference with his employment relationship arose by reason of his discharge, not by reason of the dues dispute. Mr. Brady had conceded his position on the dues dispute when he paid his dues at the new rate to maintain his good standing with the union.

Further, Mr. Brady submits that he did attempt to exhaust internal administrative remedies and was denied relief, and that additional attempts would have been futile.

c) Facts Supporting Claim That Attempts Were Made to Exhaust Administrative Remedies.

The following additional facts are submitted to establish for this Court that Mr. Brady did attempt to exhaust administrative remedies and that further attempts would have been futile:

1. March 13, 1956—Mr. Brady received a certified letter from Mr. Cliff Miller, General Chairman of the I. A. M., notifying him that he was subject to discharge unless his dues were paid by March 28, 1956 (Exhibit P-3).

2. March 27, 1956—Mr. Brady sent a registered letter enclosing his dues book and a check for $10.50 to cover the dues delinquency claimed to exist by Mr. Miller (Exhibit P-65).

3. March 28, 1956—Mr. Gerald Coleman, Financial Secretary of Local 1776 of the I. A. M., acknowledged receipt of Mr. Brady's registered letter of March 27, 1956, but returned the check and dues book, asking for dues, plus a reinstatement fee, or an amount totalling $34.75 (Exhibit P-4) by April 4, 1956. Note: Mr. Coleman sent two (2) identical letters on this date, one regular mail and one registered mail.

4. March 29, 1956—Mr. Brady sent a telegram to Mr. Cliff Miller, the I. A. M. General Chairman, and to TWA Industrial Relations, asking for assistance regarding the union security provisions of the contract.

5. March 30, 1956—Mr. Cliff Miller sent a telegram to Mr. Brady requesting what assistance he needed.* Also, on that same day, a certified letter was sent from Mr. Benjamin Hayden to Mr. Brady, notifying him that he had been relieved of his standing as union Shop Steward at TWA. A copy of Mr. Hayden's letter is attached as Appendix 1b.

6. April 3, 1956—Mr. Brady filed his first Appeal with the Systems Board of Adjustment to meet the deadline set by Gerald Coleman in his letter of March 28, 1956 (Exhibit missing). Mr. Brady felt that his only recourse at this point was to the TWA-IAM Systems Board of Adjustment.

7. April 10, 1956—Mr. Brady received a registered letter from the Industrial Relations Department of TWA, informing him that the union had requested his discharge, effective April 17, 1956 (no exhibit).

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* On that same day, Mr. Miller telegrammed Mr. Benjamin Hayden, IAM recording secretary, that if Mr. Brady had not paid dues (which he had), he was no longer a shop steward nor a union member. A copy of the telegram is attached as Appendix 1a.

8. April 11, 1956—Mr. Miller sent a registered letter to Mr. Brady, correcting Gerald Coleman's demand for $34.75, and saying that Mr. Brady's union membership had been cancelled, and in order to reinstate the same, he must pay a $25.00 reinstatement fee by April 26, 1956 (Exhibit P-14).

9. April 13, 1956—Mr. Brady received a registered letter from TWA informing him that the discharge action had been terminated (Exhibit P-18).

10. April 18, 1956—Mr. Brady sent a certified letter to Mr. Miller, offering to tender dues again, but refusing to pay a reinstatement fee because he had already made a valid tender (Exhibit P-19).

11. April 19, 1956—Mr. Miller sent a letter to Mr. Brady refusing his offer to tender dues for a second time, and again demanding a reinstatement fee be paid by April 26, 1956 (Exhibit D-2).

12. April 24, 1956—Mr. Brady sent a registered letter to the Systems Board of Adjustment, submitting his second appeal to that body to meet Mr. Miller's deadline of April 26, 1956 (Exhibit D-3).

13. May 1, 1956—Mr. Brady received a letter from TWA Industrial Relations informing him that his discharge would be effective at the close of work on May 8, 1956 (no exhibit).

14. May 3, 1956—Mr. Brady telegramed Mr. J. D. Keil of TWA, Chairman of the Systems Board of Adjustment, to request the transcript of the Board Hearing, and to ask if he was entitled to the local lodge minutes (no exhibit).

15. May 4, 1956—The Systems Board of Adjustment, by special delivery letter, notified Brady that his appeal had been prematurely filed (Exhibit P-69).

16. May 5, 1956—Mr. Brady, by registered letter, submitted his third Appeal to the Systems Board of Adjustment on the basis that he had been informed that if he did not appeal, the discharge action would be considered proper and would be final and binding upon him (no exhibit).

17. May 7, 1956—O. L. Koontz of the I. A. M., Vice Chairman of the Systems Board of Adjustment, sent Brady a letter informing him that the District Lodge Minutes were not available, because he was not a member in good standing (no exhibit).

18. May 9, 1956—Mr. Brady received a letter from the Systems Board of Adjustment informing him that his Appeal would be heard May 14, 1956, in Kansas City, Missouri (no exhibit).

19. May 14, 1956—Mr. Brady received a notice from the Systems Board of Adjustment that the discharge action had been upheld (Exhibit P-73).

20. May 17, 1956—Mr. Brady sent a telegram to Cliff Miller, asking if he had any recourse under the I. A. M. Constitution regarding his discharge from employment and cancellation of union membership (no exhibit).

21. May 18, 1956—Mr. Miller sent a letter to Mr. Brady, saying that he received the telegram, but informed Mr. Brady that his discharge was final under Article XXVI of the TWA-I. A. M. bargaining agreement (no exhibit). A copy is attached as Appendix 1c. Mr. Brady was refused employment on May 17, 1956 when he reported for work.

22. June 7, 1956—Mr. Brady's lawyer at that time sent TWA and the I. A. M. letters asking for his reinstatement (Exhibit P-76).

23. June 18, 1956—TWA answered the attorney's letter, stating that the discharge action was final and binding under the bargaining agreement. A copy of that letter was sent to Mr. A. J. Hayes, the I. A. M. International President, and Mr. Cliff Miller, General Chairman (no exhibit).

24. June 22, 1956—The I. A. M. answered the attorney's letter, stating that Mr. Brady's discharge was final for his failure to abide by the terms of the bargaining agreement—and this letter came from Plato E. Papps, Chief Counsel for the I. A. M. (no exhibit). A copy is attached as Appendix 1d.

25. October 18, 1956—Mr. Brady wrote to D. Harris of TWA, pointing out the inaccuracies and misrepresentations in the testimony presented by Mr. Miller at the SBA Hearing, and asked for a rehearing (Exhibit P-68).

26. October 24, 1956—J. J. Feeney, of TWA, acknowledged receipt of Brady's letter to Mr. Harris, but replied that the SBA decision was final and binding (no exhibit).

27. February 4, 1957—Mr. Brady sent 6 registered letters, 5 of them to the SBA Board members, and one to *A. J. Hayes, International President of the I. A. M.*, again pointing out the misrepresentations and asking for a rehearing before the SBA (Exhibit P-75).

28. February 14, 1957—The Systems Board members answered Mr. Brady that their decision was final (Exhibit P-8).

29. Mr. A. J. Hayes, International President of the I. A. M, *refused to accept his copy of Mr. Brady's February 4, 1957* registered letter to him, and returned it to him unopened (no exhibit).

30. April 23, 1957—Mr. Brady filed a Complaint in the U. S. District Court for the District of Delaware.

Clearly, Mr. Brady made a good faith attempt to exhaust internal union administrative remedies before going to Court to seek relief. After some 28 contacts between the various persons in authority, both with TWA and the I. A. M., two of which letters specifically pointed out the discriminatory practices, he received no satisfaction.

Under these circumstances, further attempts to exhaust internal union administrative remedies would have been futile and the lower Courts should have so found.

The decision of the lower Court in denying Mr. Brady his request for a jury trial to prove punitive and compensatory damages resulting from the intentional interference with his employment relationship, was a clear abuse of discretion, and their decisions in that regard should be reversed, and a new trial granted on the damage issue alone. Liability has already been determined in Mr. Brady's favor.

We, therefore, respectfully request a re-hearing on the denial to grant certiorari in No. 735.

Respectfully submitted,

MORRIS DUANE,
Counsel for Cross-Petitioner.

FRANCIS L. WHITE, JR.,
DUANE, MORRIS & HECKSCHER,
Of Counsel.

30 March 1956 pub 1956

Exhibit

AH 52 2 EXTRA DL

MAR 30 1956 906A

CONFIRMATION COPY OF THIS MESSAGE
TO BE FORWARDED TO SENDER

Copy

BEN W HAYDON

103 SYLVAN AVE RUTLEDGE PENN

FINANCIAL SECRETARY .COLEMAN ADVISES ME THAT VINCENT P BRADY IS DELINQUENT IN UNION DUES IN EXCESS OF THREE MONTHS. IF THIS IS TRUE NOTIFY HIM HENDRIX AND COMPANY BY MAIL. COPY TO THIS OFFICE THAT HE IS NOT LONGER SHOP STEWARD. MINUTES OF LODGE MEETINGS ARE NOT AVAILABLE TO NON-MEMBERS

CLIFF MILLER GENERAL CHAIRMAN DISTRICT 142

Miller deposition
Page 27-50
C8

INTERNATIONAL ASSOCIATION OF MACHINISTS

1019 RIALTO BLDG.

(CFN FURNISHED)

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Appendix

A. J. HAYES *International President* ERIC PETERSON *General Secretary-Treasurer*

International Association of Machinists

GRAND LODGE HEADQUARTERS, MACHINISTS' BUILDING
NINTH STREET & MOUNT VERNON PLACE, N. W., WASHINGTON 1, D. C.

LODGE NO. 1776

OFFICE OF SECRETARY 103 Sylvan Ave. STREET Rutledge, Penna. Place March 30, 1956 Date

Brother Vincent P. Brady
507 Calhoun Road
Bellevue Hills
Wilmington, Delaware

Dear Brother Brady;

In accordance with instructions received by telegram from District # 142, this is to notify you that due to present circumstances, you are no longer eligible to be Shop Steward for T. W. A. Mechanics and will remain ineligible until further notice.

Yours truly,

Ben W. Hayden

Recording Secretary

Copy to:

V. Brady
A. Phelps
C. Miller

Appendix 16

INTERNATIONAL ASSOCIATION OF MACHINISTS

Air Transport

DISTRICT LODGE 142

1019 Fidelio Building — 326 Grand Avenue

May 18, 1936

In reply refer to file: US-SRA 10

Mr. Vincent P. Brady
507 Calhoun Road,
Bellevue Hills,
Wilmington, Delaware

Dear Mr. Brady:

In reply to your telegram of May 17, as received in this office May 18, you are referred to Article XXVI (f) of the TWA-IAM Agreement. The following is quoted from that provision.

> "Within five (5) days of receipt of such a protest, the System Board of Adjustment will meet and consider the dispute. A representative of the Company, a representative of the Union, and the employee affected will be allowed to present to the Board all evidence and argument which is pertinent to the issue. Prior to the expiration of the work day following such Board meeting, the Board will issue either a majority decision or a notice of deadlock. If a majority decision is issued, it will be final and binding upon all parties concerned. If a deadlock is reached, and if at the time of the deadlock the Board cannot agree upon a neutral to sit with the Board to decide the dispute, the Board will immediately request the National Mediation Board to appoint a neutral, and the Board will meet with him at the earliest opportunity and decide the dispute. At the meeting of the Board, sitting with a neutral, a representative of the Company, a representative of the Union, and the employee affected will be allowed to present to the Board all evidence and argument which is pertinent to the issue. A majority decision of the Board, including the neutral, will be issued within five (5) days after such meeting and will be final and binding upon all the parties concerned."

Very truly yours,

Cliff Miller
General Chairman
District 142

CM:pa

cc: Lodge 1776
E. T. Cheslock
G. C. [illegible]man
Frank Heisler

"HE IS FREE FROM DANGER WHO, EVEN WHEN HE IS SAFE, IS ON HIS GUARD."

EXHIBIT A

Appendix 1c

C - O - P - Y

INTERNATIONAL ASSOCIATION OF MACHINISTS

1300 Connecticut Ave. Washington 6, D.C.

June 22, 1956

Short and Connolly
Philadelphia National Bank Bldg.
N.E.Corner Broad & Chestnut Sts.
Philadelphia 7, Pennsylvania

Attention: Hugh P. Connolly, Esq.

Dear Mr. Connolly:

In answer to your letter of June 7, 1956 regarding the recent discharge of Mr. Vincent P. Brady from Trans World Airlines, Inc. because of his failure to abide by the terms of the union security provision in that agreement, we must respectfully decline your request to restore Mr. Brady to membership in goodstanding in view of the fact that at the time of the request for his discharge, he was not, in fact, a member in goodstanding of the Union.

Sincerely yours,

/S/ PLATO E. PAPPS

Plato E. Papps
Chief Counsel

cc: Trans World Airlines, Inc.
Walker
Coonley
Cliff Miller
Heisler